$2.50 a copy

Regulation

May/June 1979 AEI Journal on Government and Society

On the New Regulatory Reformers

ABE RIBICOFF
CLARENCE BROWN
ERNEST GELLHORN

Fast and Loose in the Welfare State
CHARLES FRIED

The Business PAC Phenomenon
EDWIN M. EPSTEIN
MICHAEL J. MALBIN

Premerger Notification
HUGH LATIMER

Regulators and Religion
ALLAN C. CARLSON

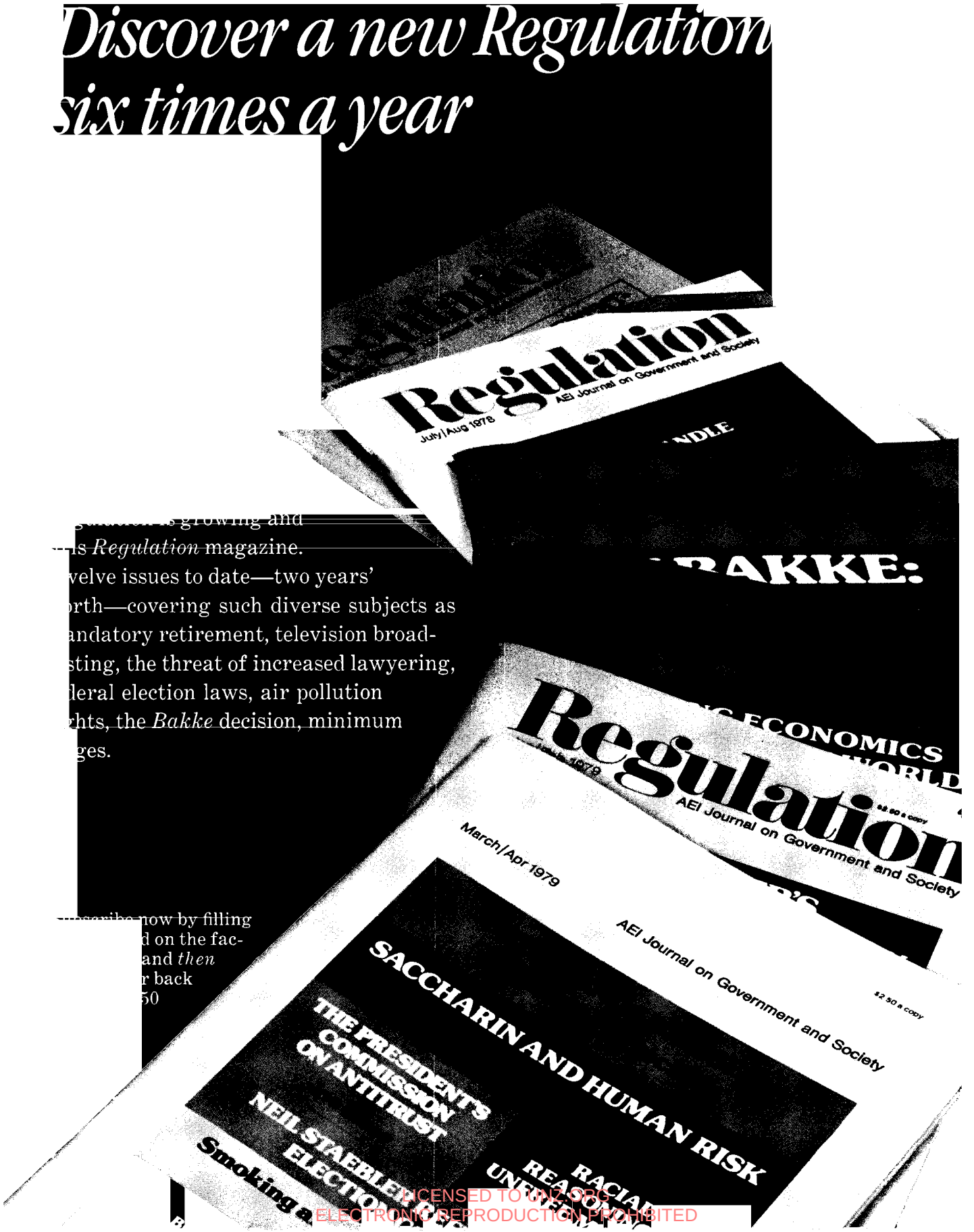
Antidumping Duties for Japanese TVs
WARREN F. SCHWARTZ

Opening Pandora's Rx • New Tack for Antitrust
Untying Cable TV • Curing Hospital Costs by Decree
What Happened to *Bakke?*

READINGS OF PARTICULAR INTEREST

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Discover a new Regulation six times a year



is *Regulation* magazine.
velve issues to date—two years'
orth—covering such diverse subjects as
andatory retirement, television broad-
sting, the threat of increased lawyering,
deral election laws, air pollution
hts, the *Bakke* decision, minimum
ges.

ubscribe now by filling
d on the fac-
and *then*
r back
50

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Regulation

May/June 1979 AEI Journal on Government and Society

Competition of ideas is fundamental to a free society

Publisher, *William J. Baroody, Jr.*

Associate Publisher, *Gary L. Jones*

Co-Editors, *Antonin Scalia* and *Murray L. Weidenbaum*

Managing Editor, *Anne Brunsdale*

Board of Editors, *Irving Kristol, Robert Bork, Jeane J. Kirkpatrick, Marvin H. Kosters, James C. Miller III, Austin Ranney,* and *Laurence H. Silberman*

Associate Editor (READINGS), *Ann S. Diamond*

Assistant Editor (PERSPECTIVES), *Jeremy Rabkin*

Assistant Editor, *Sharon Shepherdson*

Contributing Editors, *Glenn Hackbarth* and *Joe Sims*

Production Editor, *Donna Spitler*

Designer, *Pat Taylor*

Editorial Consultant, *W. S. Moore*

REGULATION, *May/June 1979, Vol. 3, No. 3. Published bimonthly by the American Enterprise Institute for Public Policy Research.*

Copyright 1979 American Enterprise Institute.

Subscription rates: $12 for one year, $22 for two years (add $2 per year for foreign subscriptions). Single copy price, $2.50. Information on bulk orders or multiple subscriptions available on request. Editorial and business offices: c/o AEI, 1150 17th Street, N.W., Washington, D.C. 20036. Send changes of address and all subscription correspondence to Circulation Department, c/o AEI, same address.

Application to mail at second-class postage rates is pending at Washington, D.C.

"American Enterprise Institute" is the registered service mark of the American Enterprise Institute for Public Policy Research.

LETTERS 2

PERSPECTIVES on Current Developments 4
Generic Drug Equivalents: Opening Pandora's Rx
Curing Hospital Costs by Decree
New Tack for Antitrust
What Happened to *Bakke*?
Untying Cable Knots
In Brief—

VIEWPOINT: Fast and Loose in the Welfare State 13
Charles Fried

ON THE NEW REGULATORY REFORMERS

For Effectiveness and Efficiency: S. 262 *Abe Ribicoff* 17

A More Demanding Standard: The Brown-Bentsen Bills *Clarence J. Brown* 20

Reform as Totem—A Skeptical View 23
Ernest Gellhorn

REGULATORS AND RELIGION: Caesar's Revenge 27
Allan C. Carlson

THE BUSINESS PAC PHENOMENON

An Irony of Electoral Reform *Edwin M. Epstein* 35

Neither a Mountain nor a Molehill *Michael J. Malbin* 41

PREMERGER NOTIFICATION *Hugh Latimer* 46

ANTIDUMPING DUTIES FOR JAPANESE TVs 53
Warren F. Schwartz

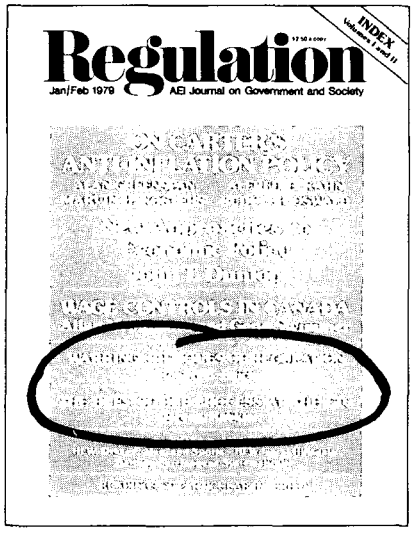
READINGS of Particular Interest 57

ISSN 0147-0590

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.



Critiques of Regulation

TO THE EDITOR:

In *Warring Critiques of Regulation* (*Regulation,* January/February 1979), Robert Reich develops the theme that there are two distinct strains of criticism of contemporary government regulation, one holding that the process suffers from an inadequate infusion of democracy in the form of effective public participation, and the other pointing to a lack of focus on economic consequences. I agree with him about the ultimate potential for conflict between these views, but I question whether they are at present—as the title of the article suggests—such complete antonyms.

The pressure for increased public participation is only partially related to the idea that the regulatory process should be democratic in the sense that the views of particular constituencies should be important, regardless of basis, simply because they are indeed the views of these groups. To the courts, at least, another and perhaps stronger reason for forcing agencies to adopt more open regulatory processes is discomfort with the quality of agency technical analysis and hope that public participation will prove an effective method of quality control. See, for example, the recent decision in *Environmental Defense Fund* v. *Blum,* 458 F. Supp. 650 (D.D.C. 1978), which makes the usual judicial deference to agency expertise explicitly contingent on the existence of an opportunity for outside parties to review the work.

Nor does the "economic impact" critique as currently practiced seem to me quite as extreme as the article would have it. While the argument that regulatory policies should maximize public welfare from an economic point of view is readily defensible, much economic criticism of regulation at present is even more fundamental. It is based not on the conclusion that regulation is failing to maximize welfare but on the conclusion that the very sign of the impact is wrong, and that better economic analysis might at least change it from minus to plus.

Over the longer term, though, the potential for conflict does exist. As Professor J. O. Freedman points out in *Crisis and Legitimacy* (Cambridge University Press 1978), the current crisis of regulation is at heart a problem of legitimacy. The classic view that agency action is cloaked in the legitimacy of the democratic legislature has come unraveled, and the democratic and technocratic critiques represent alternative ways of trying to create an acceptable rationale for the existence of agency power. The first would do this by applying direct democracy to the regulatory process itself. The second concentrates on reweaving the congressional cloak by emphasizing that the historic basis for legitimacy of administrative action has been that agencies could, under the direction of the democratic legislature, apply expert knowledge to problems in a way that is not possible for a representative assembly. In this technocratic view, the existence and use of genuine rather than presumed or fictional expertise is the key to acceptance by the Congress and by the people, and much of the current problem is due precisely to the fact that the agencies have let their bases of expertise and competence deteriorate because they have been captivated by the idea that they can function as mini-legislatures.

James V. Delong,
Administrative Conference of the United States

Due Process

TO THE EDITOR:

Jeremy Rabkin's assertion that it would be "plainly unfortunate" if courts review rulemaking proceedings to determine whether regulators harbor inappropriate biases ("Rulemaking, Bias, and the Dues of Due Process at the FTC," *Regulation,* January/February 1979) is built on the traditional rigid dichotomy between rulemaking and adjudication. The distinction applies relatively well when rulemaking proceedings remain inquiries into general, policy-type facts or "legislative" facts—the kind that are presented in a congressional hearing. A prime example of such a proceeding is the one in which the FCC determined the number of radio stations any one company could own: it is purely a policy choice.

Unfortunately, much modern rulemaking simply does not fit this mold and so the former stark distinction between rulemaking and adjudication has become increasingly blurred. Rulemaking authority today is often predicated on a prior determination of facts—not facts involving a single company or a particular past event, as in adjudication, but on technical facts. The factual determination limits the discretion available to the agency and holds it in check. For example, OSHA can regulate occupational exposure to a chemical only if to do so would improve the health of employees. Thus, before OSHA can issue a standard, it must make a factual determination that the chemical causes illness. Only then can it exercise its discretion in determining what level of exposure to permit

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

and which safeguards in particular to require.

Rabkin's analysis ignores the important factual component of modern rulemaking. It is plainly inappropriate for regulators to take so strong a position on a proposal that they could not fairly consider the factual information to be determined before the agency acts. It would, for example, be inappropriate for an administrator of OSHA to argue for the ban of a chemical from the workplace before any factual inquiries have been made. Rather, the facts must be fairly considered before there is room for policy.

As to general policy, Rabkin is probably right: The President is entitled to appoint people with particular viewpoints, and they in turn are entitled to seek implementation of the policies they favor. On the other hand, the regulator must not take such an adamant position that he can no longer be fair in making necessary factual determinations. If the bias in favor of a particular policy is so strong that it corrupts the ability to make the required determination, then the administrator can no longer perform his job and should be disqualified.

Contrary to what Rabkin intimates, the mere discussion of a proceeding with others does not lead to disqualification, nor does an expression of policy. Thus, for example, it is *not* inappropriate for the chairman of the CAB or ICC to support the policy of deregulation. But in rulemaking, as in adjudication, a prejudgment of critical facts must not be made.

The court's recent disqualification of the FTC chairman from a rulemaking proceeding because his actions clearly indicated he had made up his mind on the facts before the proceedings even began is an important check on extreme actions by regulators. Surely the precedent will not often be invoked, but its very existence serves to define the boundary of propriety. That is important if we are to have faith that the part of the regulatory process that is supposed to be rational is rational in practice as well as in theory.

Philip J. Harter,
Washington, D.C.

JEREMY RABKIN responds:

Mr. Harter maintains that the courts ought to intervene to prevent bias in rulemaking—as well as adjudication—because rulemaking today also rests on factual determinations. His account of "modern rulemaking" makes one envy the lot of the old-fashioned kind of administrator, who, it seems, did not have to consider facts at all—or at most only had to consider "legislative facts," which are apparently not quite the same as real facts. The congressman's lot sounds still more enviable: nothing to determine but "pure policy." I do worry, though, what may happen when Mr. Harter's colleagues of the Washington bar discover that congressional enactments sometimes do rest on prior assessments of fact—even (to use his term of distinction) "technical fact." Will they ask the courts to disqualify Senator Kennedy from voting on the windfall profits tax because his rhetoric indicates clear bias on some factual premises of the legislation?

Mr. Harter stresses that an agency's authority to issue any new rule in the first place may be contingent on a prior factual determination—as in his OSHA example. But this situation is not unique to modern administrative agencies. Congress, itself, retains only specifically delegated powers under the Constitution, much as agencies do under their statutory mandates. There was even a time when the courts would invalidate congressional enactments because there was insufficient evidence that their policy objects were related to "interstate commerce," as the constitutional grant required.

Of course, it has been a long time since the courts have dared to discipline Congress in this way. But they are still quite willing to overturn administrative rules that are unsupported by factual evidence. If OSHA bans a particular substance from the workplace without strong evidence that it is dangerous, the courts can overturn the action as arbitrary. But to do so, they need not inquire at all into the preconceptions, the state of mind—or the public rhetoric—of the commissioners who voted for it. Mr. Harter's demand for safeguards against bias points to a different issue, altogether. When the courts disqualify a regulatory commissioner for bias, they are acting not to safeguard the reasonableness of the result but the atmosphere of the proceeding.

No doubt even the appearance of bias must be avoided in the special circumstances of adjudication, because public confidence in the authority of judges (or administrative officials acting as judges) derives ultimately from our trust in their impartiality. It is only because judges strive to appear impartial that it is acceptable for them to be politically unaccountable. But Mr. Harter's principle—that the appearance of bias must be avoided any time an assessment of facts is required—would oblige us to put the entire government into the hands of judges or judge-like officials. It is surely too late—or too early—in American history for that.

In a healthy democracy, legislators should feel obligated, in most circumstances, to express their views openly and try to persuade the voters of the correctness of these views. At the least they must give the public opportunities to judge the perspective that underlies their policy views. That is the only way elected officials can lead while remaining politically accountable. A system in which candidates were disqualified from taking legislative office because of their campaign rhetoric would hardly be accounted a democracy.

Nothing in Mr. Harter's letter persuades me that administrative rulemaking should be regarded any differently from legislative activity in this respect. In their rulemaking capacity, regulatory commissions are accountable to Congress, if not directly to the voters. Whether or not it is wise for Congress to delegate so much legislative authority to administrative rulemakers, it is surely dangerous to pretend that their activity can ever be nonpolitical. Doubtless the public—as well as Congress and the courts—will place less confidence in the policy decisions of a commissioner whose rhetoric suggests a demagogic or fanatical stance rather than a sober and conscientious approach. But we are better off, in any case, with a clear picture of the men who govern us.

A final point. Mr. Harter insists that no commissioner would ever be disqualified for expressing general views in favor of deregulation. In fact, after the Pertschuk disqualification, a suit was launched against ICC Chairman O'Neal for doing just that. The mere threat of bias suits may have a chilling effect on the public pronouncements of regulatory officials, beyond the restrictions the courts might actually impose. Mr. Harter himself, at any rate, does not offer any more reliable formula for distinguishing legitimate from unallowable public pronouncements than for distinguishing factual determinations from "mere" policy judgments in administrative rulemaking. ■

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Perspectives
on current developments

Generic Drug Equivalents: Opening Pandora's Rx

The Federal Trade Commission has designed a model uniform drug substitution bill and is urging all state legislatures to put it into law. The bill's proponents claim it will substantially reduce the costs and increase the range of choice for purchasers of drugs. Ironically, though, this consumerist legislation turns out to illustrate another favorite theme of "public interest" activists—the difficulty of weighing costs and benefits in government regulation. For the actual potential of the measure remains shrouded in uncertainties.

Under the bill, a pharmacist would be allowed to substitute a non-brand-name drug identified by its "generic" name—say, propoxyphene—for a prescribed brand-name equivalent—in this case, Darvon. Substitution would be authorized in all cases where the prescribing physician did not specify on the prescription that the brand-name formulation was "medically necessary" (or some equivalent phrase). To encourage pharmacists to make substitutions, the bill would immunize those who did so from additional legal liability should the generic drugs produce ill effects. And it would require the state to maintain an approved list of drug formulations (like that currently in the works at the Food and Drug Administration) that would instruct pharmacists on acceptable "equivalences" between brand-name and generic drugs.

If the FTC bill were to be adopted in all fifty states, it would displace a variety of substitution laws, currently operating in forty states—few of them as strong as the FTC's proposal. There is considerable dispute about what experience with these state laws should lead us to expect from widespread adoption of the FTC's bill. No one denies that brand-name drugs are generally more expensive than their generic equivalents. But there is much disagreement about how large the price differential really is on the average—and, of course, much disagreement about the quality of research involved in the conflicting estimates.

Still more disagreement derives from uncertainties about how physicians and pharmacists would respond under the new system. Those who expect the bill to produce a substantial shift toward generic purchases assume that the physician will rarely insist on the brand-name product. They speculate, for example, that physicians often prescribe brand names because those names are drummed into them by drug company drummers (so the physician remembers "Darvon" but not "propoxyphene"). On this point, the FTC grants that most doctors consciously choose brand-name products because they place greater confidence in a particular manufacturer or variant of the drug; but it argues that even these doctors will rarely cite the brand-name version as "medically necessary" (a term which, to many doctors, apparently implies that a particular remedy is absolutely indispensable).

If the frequency of both responses is disputed, however, so is the response to be expected of pharmacists confronted with a brand-name prescription marked only with a deferential "recommended" (or no annotation at all). Other things being equal, economic incentives would seem to encourage pharmacists to provide the generic equivalent in these situations —because, according to drug manufacturers, the average retail mark-up is generally higher on less expensive than on more expensive drugs. But there are so many complex variables in the retail pharmacy business that other things are rarely equal.

Moreover, some significant issues of health policy are still in dispute. First, establishing "equivalence" is by no means a straightforward laboratory operation, for there are several differing standards of equivalence, each with its own operational uncertainties. There is "bio-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

equivalence"—defined as equivalent bioavailability—with bioavailability meaning the rate and extent of absorption of the dosage form of the drug into the relevant part of the patient's system. There is also "therapeutic equivalence" —defined as having the same effect on the patient. Drugs that are bioequivalent are not always therapeutically equivalent, though. Some clearly are not, but the drug companies differ with the FDA on their number and importance.

Second, the major pharmaceutical companies warn that they may have to cut back on new drug research if their profits on brand-name drugs begin to falter. They claim that, if research and development costs are taken into account, they actually lose money on most new drugs during the period of patent protection. If the new products lose market share to generic competitors once the patents run out, the companies may never be able to recoup their initial development costs. Brand-name sales may thus be vital to keep pharmaceutical R&D afloat and so to keep new drugs coming on stream at the present rate. The FTC does seem to be acknowledging this problem when it suggests that the companies might be given longer-lived patents on new drugs to compensate them for the initial research investment. But congressional action would be necessary to extend patent lives, and the drug companies fear it will never occur.

Of course, one may question whether reduced R&D investments would really lessen the quality of pharmaceutical research or whether fewer new drugs would really affect the prospects for improving medical treatment. The truth is that no one can say for sure. Our ignorance on these points suggests a final question: with the many uncertainties about the likely effects of generic drug substitution, should we really be eager to see the present pattern of state-by-state experiment displaced by a uniform national policy?

Curing Hospital Costs by Decree

According to HEW Secretary Joseph Califano, the Carter administration's hospital cost containment bill (S. 570 and H.R. 2626) is a litmus test for views on inflation. Any member of Congress who does not support the bill, the secretary says, is not serious about fighting inflation. Not everyone would agree.

The last congressional debate about rising hospital costs actually revealed many points of factual and philosophical disagreement. Some members argued that Congress should do nothing but support "The Voluntary Effort," a cost control organized by hospital, physician, and insurer groups. Its proponents claim that, through exhortation and peer pressure, the program cut the rate of increase in total hospital expenditures by two percentage points in 1978 and will do the same in 1979. Other members of Congress supported the Carter administration's proposal for a 9 percent cap on the rate of increase in the revenues of individual hospitals and a $2.5 billion cap on total hospital capital expenditures. Still a third group scorned both of these approaches, saying that enhanced price competition among medical providers and insurers would be the best cost control.

In late 1978, the Senate adopted a compromise between the first two approaches that would have given The Voluntary Effort an opportunity to meet its goals, while providing standby controls to go into effect automatically should that program fall short. Though the bill died in the House of Representatives, its compromise forms the heart of the Carter administration's latest cost-control proposal, but with two major changes. One is that the administration's new bill provides many more exceptions and exemptions. Under last year's compromise, the standby mandatory controls, once triggered, would have covered almost all hospitals (the main exemption being hospitals covered by mandatory state programs that were holding expenditure increases to a specified rate). The new bill expands exemptions to the point where HEW now estimates that only half the nation's 6,000 community hospitals would ever be covered by the mandatory controls. The second major change is the wide discretionary authority that the administration's bill would vest in the secretary of health, education, and welfare over important aspects of the program. Both changes, it is said, will make the regulation more flexible and thus more equitable.

Needless to say, hospital administrators and doctors are not mollified by these concessions and many regard them as cause for alarm. The new bill's greater complexity is viewed as evidence that HEW expects the controls to last for a long time; and the broad discretion granted to Secretary Califano, who is

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

"Would you like a single room for $362 a day, a double room for $235, or file drawer B for $117?"

Reprinted courtesy of the *Chicago Tribune*.

regarded as stridently anti-industry, increases the industry's fears. Still, the principal criticisms advanced by the American Hospital Association and the Federation of American Hospitals, the main industry lobbying groups, are those pressed against last year's proposal:

—the bill regulates hospitals, when in fact physicians make most of the important decisions affecting health care;

—the bill pegs revenue limits to a hospital's revenues in a past year, thus rewarding wasteful hospitals and punishing efficient ones; and

—the bill encourages hospitals to break away from The Voluntary Effort in order to pad their revenue base in anticipation of controls.

The third force in the debate, composed of advocates of increased price competition in medical and insurance markets, concurs in most of the arguments about the distortions the proposed regulation would bring. Even so, its spokesmen present their own catalogue of complaints about both the administration's bill and the stranglehold of the hospital, medical, and insurer establishments on the health-care marketplace. One of their most important criticisms is that the bill perpetuates the myth that federal health policy is basically sound and that greedy hospitals, doctors, and insurers are the only culprits. Market advocates argue that, while health-care providers and insurers have not always welcomed new and more efficient ways of providing health care, government promotion of inefficient types of insurance coverage (through Medicare and Medicaid, tax subsidies for employment-based insurance, and handicapping of alternative methods for delivering and paying for medical care) has abetted the industry's recalcitrance. The government, they charge, now appears to realize the folly of many of its health policies but refuses to change them to permit a smoothly and efficiently functioning private market. Instead it attempts to offset their worst effects through regulation—and when regulatory quick-fixes do not operate as intended, it reaches for broader and more arbitrary controls. The new hospital cost-containment proposal is, according to these analysts, merely the next notch upward in this process of "escalating arbitrariness."

The market advocates also object to the administration's proposal—as well as the rhetoric surrounding it—because it reaffirms the notion that the government should take primary responsibility for controlling health-care costs. In their view, this notion, combined with government policies like those noted above, has

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

encouraged private-sector reticence about entering the "treacherous no-man's land of cost containment" (as Professor Clark C. Havighurst has called it). Why should employers, unions, and insurers (or, for that matter, small groups of physicians and hospitals) take innovative steps to make medical decisions more cost-conscious—and risk provoking the wrath of the health industry establishment in the process—when the government threatens follow-up actions that might deny the innovators their just reward?

Despite the appeals of Secretary Califano, the real issues in this debate go far beyond the immediate concerns of the administration's present anti-inflation program.

New Tack for Antitrust

There has been an unusual number of major antitrust bills thrown into the congressional hopper this year, but none more controversial than the "Small and Independent Business Protection Act of 1979." This proposal, sponsored by Senator Edward Kennedy, would essentially forbid all mergers among very large corporations, even mergers that could be shown to have a beneficial effect on competition.

It is a good bet that any legislation with the word "protection" in the title is not based on economic notions of efficiency. In the context of economic regulation, the word "protection," like the word "fair," tends to conflict with ordinary notions of free enterprise. Fair trade laws, codes of fair competition, protectionist tariffs —all these are designed to restrict independent economic initiatives. And the proposed Small and Independent Business Protection Act is designed not to prevent mergers that would harm competition, but instead, as Michael Pertschuk of the Federal Trade Commission put it, to impose a "Jeffersonian preference for dispersed power" on the economy. The bill is based on something "different from the traditional antitrust rationale," says David Boies, Senator Kennedy's chief antitrust staffer.

Until recently, the most commonly articulated populist concern was industry concentration—the domination of particular industries by a small number of large companies. This is bad, they said, because it encourages "oligopoly pricing," or "price leadership," or "administered pricing"—the notion being, whatever the label, that concentrated industries are less competitive than more atomistic industries.

In part, these arguments were possible because there was relatively little economic literature on the effects of concentration. That was soon remedied, however, as concentration and its impact became an extremely popular subject of economic inquiry in the late 1960s and early 1970s. The results of the inquiry were startling: not only is concentration much lower than was generally perceived (once investigation came to focus on revelant markets rather than on largely irrelevant "industries"), but it is not even certain that more concentration means less competition. Some studies, in fact, showed that prices rise less rapidly in concentrated industries, and others showed that prices may actually decline as industries become more concentrated. Some economists went so far as to assert that in certain industries high concentration is desirable.

With the dissemination of such studies, much of the steam went out of the "break 'em up" school of antitrust populism. There are still efforts to attack existing market structure ("shared monoply" and "no-fault monopoly" are two of the concepts in current use), but these seem unlikely to be significant in the long run. By now, most of the energy that used to go into attacking concentration has been switched to conglomerate mergers. And this time the advocates of new legislation generally disclaim *any* reliance on economics. To be sure, they talk about "aggregate concentration," by which they mean the portion of U.S. corporate assets held by the 100 or 200 or 500 largest corporations. But this is a concept with no economic significance since it tells nothing about structure or performance in any particular market.

Instead of talking about breaking up companies or restructuring whole industries—threats that can unnerve even those who sympathize with the populist suspicion of size—the goal now is a rule against "giant" mergers. This seems to be much easier to accept, and the downside risks seem much smaller. Thus, in this new debate, the proponents of new legislation appear to have gotten off to an early lead. And the proponents have another advantage. This year, for a change, the two major powers in antitrust are united. In recent years, the Justice Department's Antitrust Division refused

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

to support legislative proposals that could not be justified on a purely economic basis. Today, however, Assistant Attorney General John Shenefield strongly supports conglomerate merger legislation, as does FTC's Pertschuk.

There are some significant differences between the various proposals, however. Kennedy's bill would prohibit mergers (1) between all companies with assets or annual sales of $2 billion each, (2) between companies with assets or sales over $350 million unless they could show that the transaction would have the "preponderant effect of substantially enhancing competition" or "would result in substantial efficiencies," and (3) between one company with over $350 million in assets or sales and another with 20 percent or more of any market having at least $100 million in annual sales. These prohibitions could be avoided only if the larger party to the merger divested one or more "viable business units" equal in total size to the smaller party within one year before or after the merger.

The Justice Department's proposal would apply only to companies with at least $100 million in sales or assets. A merger between such companies that resulted in combined assets or sales of $2 billion or more would be allowed only after proof that it would yield "significant competitive benefits." The same standard would apply to companies with at least $1 billion in sales or assets that attempted to acquire a company with annual sales over $100 million and representing 20 percent or more of a concentrated market (that is, a market where four leading firms had 75 percent).

The FTC's proposal would prohibit mergers where the total assets or sales of the resulting company exceeded $2 billion. As in the Kennedy proposal, mergers would be permitted only if the acquiring company spun off a subsidiary equal to the size of the acquired company before the merger. As in the Justice Department's proposal, the ban would apply only to acquisitions of companies of over $100 million. The unique feature of the FTC proposal is that the numbers would be adjusted automatically each year to keep up with inflation.

Despite these differences, there is a clear consensus among the most important antitrust policy-makers that *some* such legislation is needed. This unusually broad agreement may make a telling difference in the congressional debates. But the common premise of all these proposals is sufficiently dubious that a vigorous debate cannot be unwelcome.

What Happened to Bakke?

When the Supreme Court upheld Allan Bakke's reverse discrimination claim against the University of California at Davis last June, many civil rights leaders warned that the decision could threaten operations of the various civil rights programs of the federal government. Almost a year later, however, it is difficult to find evidence that the Court's decision has seriously affected the procedures or attitudes of federal officials responsible for civil rights enforcement. Indeed, if *Bakke* has had any noticeable effect, it has been to encourage official approval of racial quotas.

HEW's Office for Civil Rights administers the programs most directly connected with the immediate legal issues in *Bakke*. OCR is responsible for enforcing, among other things, Title VI of the 1964 Civil Rights Act, which forbids recipients of federal funding to discriminate on the basis of race, color, or national origin. Since the University of California is a major recipient of federal education grants, Allan Bakke's claim that the medical school at Davis had discriminated against him on the basis of his race fell squarely within OCR's jurisdiction. And Bakke did, in fact, begin his long legal battle by initiating a complaint with OCR's San Francisco Regional Office. When officials there were slow to move beyond preliminary inquiries, however, he took his plea to the federal courts. OCR, which had no announced policy on the sort of special minority admissions quotas contested by Bakke, thereupon dropped his case. And, although OCR has issued numerous guidelines and policy statements over the years to clarify Title VI requirements, it took no stand on the broader issues raised by *Bakke*—even as the case went on to become a national sensation.

Thus when the issue finally reached the Supreme Court, neither the four justices who thought Title VI barred racial admissions quotas, nor the four who maintained it did not, could refer to HEW standards to support their interpretation—though it is the usual judicial practice to give great weight to administrative

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

In Brief–

No Saving on Checking. Last November, in an important regulatory shift, the Federal Reserve Board authorized banks to offer automatic transfer of funds between savings and checking accounts, effectively allowing consumers to earn interest on checking accounts (see *Regulation*, July/August 1978). By the beginning of April, consumers had placed more than $6.26 billion in such automatic transfer accounts, at some 351 different banks around the country now offering this service. But the U.S. Court of Appeals for the District of Columbia held on April 20 that the Federal Reserve did not have the authority to make such a sweeping change in banking regulations under existing law. The court delayed the effect of its decision until next January, however, giving Congress time to save the new approach if it chooses to. Bills for that purpose have already been submitted in the House of Representatives.

Keeping Up Appearances. The *Federal Register* announced on April 3 that it will henceforth be printed in a larger typeface so that new federal regulations can be read more easily. But what will this do to all those quick calculations of regulatory output based on the number of pages in the *Federal Register* each year? No problem. The *Federal Register* also announced that it will carry more lines on each page so that the larger typeface will not add more pages. Of course, this means that federal regulations will now be creeping into previously open spaces—not for the first time, to be sure.

Reversing Freedom of Information. On April 18 the Supreme Court held in *Chrysler* v. *Brown* that the Freedom of Information Act could not be used to *prevent* federal agencies from disclosing sensitive information. The act requires federal officials to respond to information requests from members of the public, except in specified circumstances. The exception for "trade secrets" and "confidential or privileged" commercial information has been successfully relied on by business firms in a number of so-called reverse Freedom-of-Information Act suits—that is, suits seeking to enjoin agencies from releasing sensitive information about a firm's activities.

But in *Chrysler* the Court held that the exemptions merely authorize withholding without requiring it and therefore afford no basis for suits of this kind. The ultimate significance of this ruling is uncertain, however, for the Court simultaneously ruled that businesses could move to contest disclosures for violating a nineteenth-century law against disclosure of trade secrets, whose protections, it suggested, might be fully as broad as the relevant discretionary withholding provision in the Freedom of Information Act. Public interest lawyers—including those who provoked this round of litigation by seeking Chrysler's minority employment figures from federal civil rights officials—have expressed concern that the case may end up posing significant problems for their investigative activity in the future. But the Court's opinion in *Chrysler* does not yet provide much certainty anywhere in this troubled area.

Bureaucratic Paw-Dragging. There are many sides to the problem of controlling information flows in the federal bureaucracy. Officials at the Federal Aviation Administration recently testified before a congressional appropriations subcommittee about a particularly exasperating aspect of the problem. The FAA, it seems, has been pursuing the possibility of using gerbils to sniff out tiny or remote corners of aircraft for terrorist bomb plants. Experiments have confirmed that the gerbils do indeed have a keen enough scent to detect explosive devices. But FAA officials report enormous difficulty in getting the gerbils to announce their discoveries to the human agents standing by. But the effort is continuing. "Down the road is the stage two gerbil, the attack gerbil," FAA Administrator Langhorne Bond assured the astonished congressmen. He did acknowledge, however, that "more work is needed for the attack gerbil and also credibility is a problem."

---

interpretations of statutory requirements. The reluctance of top HEW officials to commit the agency to a clear view on admissions quotas has also prevented OCR from clarifying the rather confusing divisions in *Bakke*. There has been no new policy statement on admissions quotas or racial preference in admissions from HEW in the year since *Bakke*, and while OCR says it will routinely investigate "reverse discrimination" complaints brought to it, officials there claim to have no record of the number of such complaints received in the past year or how they have been handled. What is certain is that no reverse discrimination claim has reached the formal enforcement proceedings before an HEW administrative law judge.

The Justice Department, on the other hand, though almost equally reluctant to clarify its views on reverse discrimination while *Bakke* was before the Supreme Court, has moved in the last few months to more unambiguous support of racial quotas. The *amicus* brief submitted by the Justice Department in *Bakke* last spring argued that both Title VI and the U.S. Constitution would permit federally assisted institutions to exercise racial preference on be-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

half of historically disadvantaged minorities (even where the institution did not itself have a history of racial discrimination) but could not be interpreted to authorize explicit racial quotas (except as a remedy for proven past discrimination by a particular institution). But the brief also insisted that there was insufficient evidence to determine whether the minority admissions program at the Davis medical school (which Bakke had complained against) really constituted a quota. Although that claim was rejected by all nine members of the Court, the Justice Department has taken courage from the willingness of four justices to endorse the Davis quotas, as such. In the reverse discrimination suit of *Weber* v. *Kaiser Aluminum*, now pending before the Supreme Court, the department has submitted an *amicus* brief arguing that Title VII of the 1964 Civil Rights Act (a ban on discrimination in private employment) should not prevent Kaiser from imposing racial quotas on the selection of employees for a special training program at one of its plants in Louisiana. The brief notes that the Kaiser plant in question had been charged with discrimination by different employees on several occasions and, though none of these claims was ever upheld in court, argues that this gave the company enough justification for the adoption of a quota scheme to achieve better racial balance in higher-level jobs. Though courts have occasionally ordered racial quotas to remedy cases of proven discrimination, the Justice Department's *Weber* brief seems to allow employers an extraordinary degree of latitude in deciding when racial quotas may be justified in their operations and how far they may be applied. At all events, since the Justice Department has not yet initiated or intervened in a reverse discrimination suit on the side of the complainants and has issued no policy guidelines to guide the enforcement operations of other civil rights agencies, it remains to be seen where and when it might try to draw the line on quotas to protect white males from "reverse discrimination."

The Equal Employment Opportunity Commission, an independent agency, has taken perhaps the most activist approach to the reverse discrimination problem. Some months before the Supreme Court handed down its decision in *Bakke*, EEOC issued proposed policy guidelines explicitly designed to protect employers wishing to undertake affirmative action programs from reverse discrimination suits. EEOC's authority derives from Title VII of the 1964 Civil Rights Act, section 713(b)(1) of which provides that any employer whose practices have been sanctioned by EEOC policy interpretations cannot be held liable for penalty payments (including back pay) even if a court subsequently finds the employer's behavior—and the EEOC interpretations sanctioning it—contrary to law. EEOC's original statement therefore went to great lengths to assure employers that the commission would not regard "reasonable" affirmative action measures as violating Title VII's prohibition on race discrimination in employment.

Although EEOC acknowledged that it had received many letters criticizing this approach as inconsistent with the result in *Bakke*, it nonetheless issued substantially the same guidelines in final form last January. The guidelines do not cite even one example of an affirmative action effort that might go too far to qualify as "reasonable" or that might be considered unlawful reverse discrimination. And requests for clarification have been politely refused on the grounds that the commission does not want to respond to hypothetical situations. The nearest EEOC officials would come to defining "unreasonable" actions was to state that employers might be held in violation of Title VII if they adopted racial quotas without first conducting a "self-analysis" to determine whether there was an actual need to correct an "underrepresentation" of minorities. But the commission would not say how the "underrepresentation" is to be judged (in proportion to the size of the minority population in the country? in the surrounding labor market? in the available labor force with necessary skills? in the available labor force without necessary skills but potentially trainable?).

Like HEW, the commission maintains it will routinely investigate all reverse discrimination complaints that it receives, but it has no record of the number of such complaints actually received over the past year or of how many it has settled. And so far it has not released details of even a single case where its investigations disclosed unlawful reverse discrimination.

The issue of reverse discrimination, to be sure, engages moral dilemmas and legal complexities that the Supreme Court's fragmented

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

judgments in *Bakke* certainly could not lay to rest at one stroke. But the civil rights authorities in the executive branch—whose strong support for affirmative action programs did so much to fuel the reverse discrimination controversy in the first place—have certainly not taken the lead in resolving these questions.

Untying Cable Knots

The Federal Communications Commission voted on April 25 to accept the report of its Cable Bureau staff that argues for lifting present limitations on "distant signal" importation and several other major restrictions on the development of cable television. If—as expected—the commission eventually adopts these changes now put forward for public comment, the event will mark another milestone in the effort to cut back unnecessary federal regulation. But before this particular regulatory enterprise comes to a close, its central lessons ought to be noted well: the cable experience has been a particularly vivid illustration of the degree to which regulation begets regulation and it also suggests that the ultimate cause of overregulation is, quite simply, congressional neglect.

For many years now, visionaries—and not so visionaries—have been predicting that the city of the future will be the "wired city," in which everything from entertainment to newspapers, from banking to shopping services, will be made instantly available to homes and offices through electronic hook-ups. Even the less sanguine have seen in cable television the best hope of increasing the diversity and quality of television programming.

Technology has dramatically reduced the cost of obtaining diverse programming. Satellite distribution of television signals has become so cheap that some stations have rented satellite transponders and offered their signals nationwide. There is no technological limit to the number of channels cable can carry—twenty-four is common. But its greatest advantage may be economic rather than technological.

As has often been observed, the product of over-the-air television is not news, information, or entertainment programming, but viewers: regular commercial broadcasters quite literally sell viewers to advertisers. Since viewers go for only a few pennies a head, it is obvious that over-the-air television productions of any magnitude require massive audiences. And delivering massive audiences requires "mass taste" programming—which is to say, something we all might agree on as our third choice. Cable television, though, can be financed by direct per-channel or per-program viewer charges. Where a pay cable system of this kind sells programs to viewers instead of viewers to advertisers, higher fees can enable the cable subscribers to indulge their much more diverse "first choice" tastes—from opera to soccer to extremely *outré* political commentators.

The acorn from which this oak is expected to grow was originally called CATV—for community antenna television. In areas where hilly terrain, high-rise construction, or moderate distance from TV broadcasting stations made over-the-air reception difficult, CATV wired homes to a high common antenna. As long as this was the only function that cable served, it was not opposed (and was indeed desired) by television broadcasters, and the FCC declined to assert any jurisdiction.

Wires that were already in place, though, could be used to carry other material beyond that received through the antenna. In the 1960s, cable systems in fact began to penetrate major broadcasting markets by offering signals from distant markets through microwave relay. Later they began to originate their own programming (most often sports events or feature films). Community television became cable television and suddenly began to arouse concern among over-the-air broadcasters. Instead of swelling their local audiences, cable threatened to fragment them.

There was in all this, no doubt, an element of unfairness, both to the broadcasters and to the producers and actors who sold the broadcaster their shows. For the courts held that the mere retransmission of an over-the-air signal, even via microwave, did not constitute a "performance" under the Copyright Act, and thus imposed no liability for royalty payments. The cable systems were permitted, in effect, to sell the broadcasters' product without paying for it.

Enter the FCC. By this time, cable television was playing havoc with the FCC's allocation of channel assignments, which were

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

calculated to ensure adequate profit for all licensees. Three-station markets had become nine- and ten-station markets and broadcasters feared that their profits would decline accordingly. Claiming that this new medium, over which it had no explicit statutory jurisdiction, was seriously impinging upon its authorized regulation of the broadcasting medium, the FCC asserted regulatory jurisdiction and was initially sustained in this by the courts.

In fairness to the FCC, it must be acknowledged that its regulatory intervention did not occur until after the Congress had displayed its unwillingness to take any action against the chaos that was developing, even with respect to the stark issue of copyright protection. In 1976, modest (and probably inadequate) copyright protection was finally enacted. But as to all the other regulatory incidents of this radical new technology, Congress has provided no legislative guidance beyond the substantially unamended 1934 Communications Act, which does not even mention television, much less cable, because they did not exist in 1934.

In any case, once the FCC intervened, it did so with a vengeance. It not only regulated that aspect of cable competition with broadcasting that consisted of re-use of the broadcasters' own signals (placing restrictions upon the number and content of "distant signals" that could be carried); but it regulated other aspects of competition as well, mandating the carriage of all local broadcasting signals and (in order to prevent the "siphoning off" of desirable "free television" fare) prohibiting cable systems from charging viewer fees for certain sports events and feature films. And it even went beyond this, to impose restrictions that bore little relation to the already questionable jurisdictional basis of competitive impact. Cable systems were subjected (1) to such FCC content regulation as the Fairness Doctrine and the federal prohibition of obscene material; (2) to a requirement that they engage to a significant extent in locally oriented original programming; (3) to an obligation of making one channel available to the public on a first-come, first-served basis—without charge except recovery of production costs for live studio presentations exceeding five minutes; and, of course, (4) to FCC record-keeping requirements.

It was a massive regulation of a new and tremendously promising industry—premised, it seemed, simply on the reflex assumption that since cable began its life by carrying broadcast signals, it should live and die under broadcasting regulation. Critics were less upset that this occurred than that it occurred by decree of the FCC, with the Congress entirely content to say neither yea nor nay to what was happening. It is an experience that ought to be borne in mind when assessing current regulatory reform proposals, which proceed on the convenient assumption that the principal need is procedural or structural innovation within the agencies rather than congressional attention to the substance of regulatory programs.

In any event, all of this regulatory improvisation finally became too much for the courts. In 1977, the Supreme Court struck down the FCC's "pay cable restrictions" in a decision which implied that some of the other restrictions might be invalid as well (see *Regulation*, July/August 1977). That alone may have sufficed to liberate the full potential of pay cable to offer a far wider range of programs by selling programs to viewers rather than viewers to advertisers. Now, spurred on, one suspects, as much by the legal uncertainties resulting from the Court's opinion as by the current vogue for deregulation, the FCC staff has proposed that the commission remove all restrictions on distant signal importation. It sounds like a good idea.

But getting the FCC out from where it does not belong is only half a solution; the other half is getting the Congress back where it belongs. The patchwork copyright protection with respect to distant signals provided in 1976 assumed a regime of FCC limitation. It is arguable that, in an open market, it would result in the impoverishment of the creative talent on which the quality of the entertainment system ultimately depends. The Commerce Department's National Telecommunications Information Agency has asserted that copyright revision is a sine qua non of cable deregulation. Whether or not that is so, it is certain that congressional consideration of this and other fundamental issues regarding cable is long overdue. It would be well to lay some solid foundations—secure against even the encroachments of the FCC—in what appears to be an era of regulatory moderation.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Viewpoint

Charles Fried

Fast and Loose in the Welfare State

FRIEDRICH HAYEK'S apocalyptic forecast in *The Road to Serfdom* had always seemed a bit exaggerated. Yet certain ominous voices in the populist/egalitarian chorus now openly proclaim a readiness to jettison a crucial aspect of personal liberty—liberty of choice in type and place of occupation—in order to prevent the disintegration of their favorite schemes. Arguments are now being discovered to justify requiring, in peace time, that free men and women convicted of no crime spend years of their lives at jobs and in places they do not choose, under the pain of financial penalties or of an outright bar on practicing the profession for which they have trained. Some of these partisans, going totally overboard, have proposed that *every* young person serve a period of years doing good works at the pleasure of the government or of some delegated nonprofit agency of good works.

The entering edge of the wedge is represented by proposals to cure the perceived maldistribution of physicians, although there already are incentive programs designed to deal with this maldistribution. The National Health Manpower and Training Act of 1976 allows forgiveness of student loans and assistance in setting up practice for those settling in underserved areas. Apparently because of the extravagant financial and other rewards available in attractive urban and suburban settings, this system of incentives has proven ineffective. So schemes have been proposed whereby all but the wealthiest medical students would be forced to accept assignment for a period of years in rural or central-city practices designated by some governmental authority. Medical schools receive large quantities of federal monies to support the training of physicians; and since tuition payments (the loans to pay for these are the lever of the insufficient incentives in the 1976 act) cover only a fraction of the cost of educating a medical student, the proposal is that medical students be required to pay back a major share of this subsidy, unless they agree to practice for a time in areas of governmentally designated need.

While there may be a maldistribution of doctors in our society, it is much more questionable that there is a maldistribution of lawyers. It is true that poor people have difficulties litigating their claims. But then so do middle class people. Nevertheless, there is a vocal coterie of "public interest" lawyers, judges, and law professors who believe that what the poor need, above all, is not more money but more legal services. Alan Morrison, who heads the Litigation Group for Ralph Nader's Public Citizen organization, has proposed that it be a condition of admission to the bar (that is, of being free to practice the profession for which they have been trained) that law school graduates be required to spend a one-year public service internship handling cases for those who cannot command the time and attention of lawyers on the usual basis. Morrison adds that such a system might serve the additional function of improving the general professional competence of law graduates. But he is candid enough to admit that, "first and most important," the program would make lawyers available to clients and in situations where lawyers apparently do not otherwise wish to serve in large numbers. Second, he notes that "because the internship would be mandatory, salaries could be maintained at a

Charles Fried is professor of law at the Harvard Law School.

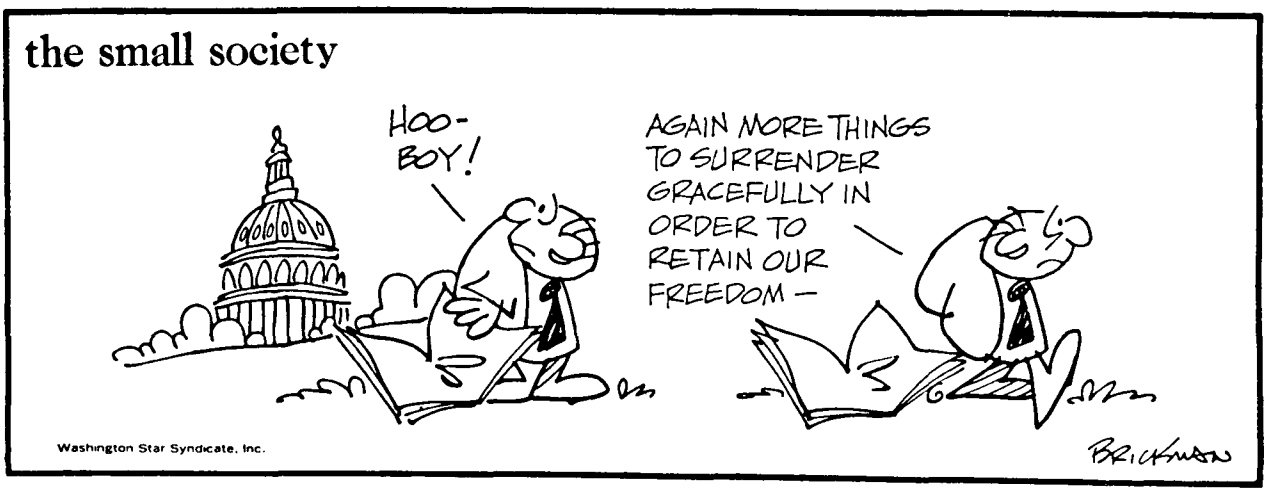
LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

relatively low level. . . ." In other words, though there may be educational benefits, the motivating force behind the proposal is its ability to compel cheap labor in the service of what Ralph Nader's organization believes to be the public good.

Judge Marvin Frankel (who recently resigned his federal judgeship in the Southern District of New York to enter private practice) has found some of the same needs Morrison found and has proposed an even more radical solution. Frankel recognizes that large corporations and wealthy individuals can command the time, energy, and ingenuity of lawyers in a way that smaller businesses or ordinary persons cannot. Therefore he would simply socialize the whole legal profession. Under his proposal, prospective clients would obtain lawyers from a government agency, which would ration them out according to the urgency and merits of the client's case and reimburse them under a uniform salary schedule. Frankel is not clear whether law practice outside of this government monopoly should be forbidden, but at the least he claims there should be powerful deterrents to such legal free-booting—for instance, denial of the tax deductibility of legal fees paid to bootleg lawyers. (This last is but a detail in a scheme clearly intended to make government employment, distribution, and allocation of all lawyers the norm.)

And, finally, a wide array of public personages—senators, media pundits such as Eric Sevareid, and professional moralizers—have thought it would be a very good thing to go far beyond compelling professionals with scarce talents to serve somebody's conception of the public good. They propose that we revive the draft, generalizing it so that one's "obligation to the community" could be discharged by a period of public service. A number of Pentagon and congressional armed services personalities have been quick to jump on this bandwagon, recognizing that even the fevered imagination of reformers would be unlikely to provide a year's useful—or even supposedly useful—employment for *every* man and woman reaching the age of eighteen. Consequently, a fair number of these young persons would in fact enter the military, thus reducing the budgetary pressure of the present voluntary army. In this way, older citizens would get the defense establishment they desire at somebody else's expense; reformers and activists would have a huge pool of unwilling manpower at their command; and ideologues could proclaim the principle that every citizen owes not only his fair share of tax revenues but a fair measure of his person, life, and liberty—to be given in community service as defined in congressional legislation, implemented in agency regulations, and administered by the vast horde of not-for-profit public interest organizations that would surely jump on this bandwagon.

The principal point is this: in a free society a person may go where he wishes and, so long as he harms no one (a fortiori where he serves in a useful way as do doctors and lawyers), may do as he pleases with whom he pleases. It is the very essence of a tyranny for a government to assert a general power over its citizenry, directing where they shall live, what work they shall do, with whom they shall associate. If liberalism stands for nothing else it affirms that each person owns himself—whatever other property may be accorded to him—


the small society
HOO-BOY!
AGAIN MORE THINGS TO SURRENDER GRACEFULLY IN ORDER TO RETAIN OUR FREEDOM —
Washington Star Syndicate, Inc.
BRICKMAN

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

and that no one's *person* (at least) belongs to another, not even to every other, that is, not even to the community as a whole. These are axioms so basic, so deeply ingrained in Western society, that it is almost embarrassing to have to repeat them. Yet the quality of public debate today makes it plain that many American politicians and many more intellectuals have cut quite loose from these fundamental moorings. How has this come about?

I start with academic lawyers, because I know them best and because for generations they have rationalized what their former students have practiced in the political arena. Academic lawyers are trained to pose embarrassing questions designed to show that no principle is so fundamental, no case so clear, that a seemingly slight variation in the facts will not put it into doubt. Do I say that a free man in a free society may go where he pleases and engage in what harmless pursuit he wills? The academic lawyers respond: But what if he has not the fare in his pocket or the wherewithal to facilitate his favorite pastime? He is not free, then, is he? And do we not pay him, put money in his pocket, make him free for *social* purposes, for the good of the community? So why can we not restrict and direct his choices directly in the name of that same good?

That is how the argument goes. It starts by eliding the distinction between coercion and lack of opportunity and ends by justifying whatever coercion government proposes. So it is no surprise that someone who sees no differences between ordering another where to go and simply failing to make it possible for that person to go wherever he pleases will not long hesitate to propose solutions for social problems that involve directing people how and where to live their lives.

Now it is said that doctors and lawyers are a scarce resource—and have we not learned in the regulation of utilities and businesses affected with a public interest that scarcity is a predicate for regulation? Here again one is left almost speechless by the moral obtuseness that treats people as public utilities and cannot see the threat to liberty implicit in equating men and women with trolley lines or electric companies. To be sure there are arguments about the wisdom or morality of much regulation of business and property, but a sensible person knows when an argument or a doubt is being pushed too far. And it is just my point that those intellectuals who follow their own arguments to the point of contemplating the socialization of *people* have quite simply taken leave of their common sense.

. . . one is left almost speechless by the moral obtuseness that treats people as public utilities and cannot see the threat to liberty implicit in equating men and women with trolley lines or electric companies.

Surely, it is argued, the case of the doctor is special. Not only are doctors a scarce resource, but in their case (unlike that of lawyers) a lot of public money has been spent for training, and so they owe a portion of time to that same public. Once again, rather than play the game of distinction and analogy, I ask those who use this dreadful sophism to consider its implications. Who in this society has *not* been trained and nurtured in part by public funds? Do we then all belong to the state? May it command the lives of any of us whenever the regime of free choice begins to seem too costly, too inconvenient, as one pursues some "moral equivalent of war" on cancer, or illiteracy, or slum housing, or billboards, or smoking, or impure air, or junk food?

Now I agree that, in the last analysis, the arguments of the academic apologists are not what will precipitate us into the slough of compulsion. It is the politicians who will do that, which means it is the forces making personal compulsion politically attractive that need to be identified. In general the forces are fueled by money and power. The resort to personal compulsion is a last resort when politicians fear that the public will not pay the cost of programs pushed on behalf of abstract principles or, more likely, on behalf of some client group.

Consider again the suggestion that every young lawyer be forced to serve for a year at less than market wages. This is after all just the most recent version of an earlier suggestion that law schools assess all students a fee for support of public interest research groups. Now it is surely no accident that those who made their reputations organizing public inter-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

est law should see in that activity a universal panacea to the society's ills. And if it appears that not enough recruits are lining up to enlist in one's crusade, one turns to coercion. But why are they not lining up? Not because there are not enough lawyers—indeed, many lawyers find it hard to obtain employment and thousands leave the practice every year or never enter it after graduating from law school. So the bodies are there, but the pay and conditions of work seem unattractive, even compared to alternatives outside the profession. Presumably, if society believed that the service the Naderites envisage were indeed essential, it could offer (from tax revenues) salaries to attract persons to it, but obviously no one believes that the public would be willing to tax itself towards this end. Thus, though Marvin Frankel is convinced that universal equal access to legal counsel is essential, the voters and taxpayers in our democracy probably are not—at least not enough to pay for it.

The political thrust for conscription of doctors is similar but its environment much more complex. Although reasonable salaries could probably attract young lawyers to any interesting, useful line of legal work, doctors seem to be able to create lucrative practices in the same overserved desirable locations almost ad lib. The reason, of course, is that doctors (far more even than lawyers) have operated for generations as a conspiracy in restraint of trade, systematically resisting institutions like pre-paid health plans, interstate licensing, consumer control of hospital and insurance boards, provision of basic services by nurses or paraprofessionals. Until recently government has been totally compliant. Now when it is apparent that the dream of equal access cannot be achieved at anything less than staggering cost, the reflex of the health care ideologues has not been to reexamine the dream to see if anyone really wants its fulfillment enough to pay his share. Nor yet is it their reflex to break the monopoly power of the medical profession in order to allow organized groups of consumers—such as employers, labor unions, fraternal groups—to shop around for the level of care their members desire, delivered at competitive prices. No, such a strategy might show that different people really do differ in their preferences for health care (when faced with the true costs and real alternatives), and this would undermine the plausibility of arguing for one level of health care for everyone. And so while ten and twenty years ago politicians failed to work for a competitive regime in health care out of fear of the medical profession's political power, today that same failure may perhaps be traced to the threat that a free market spells to the very plausibility of egalitarian slogans.

But, financing apart, obviously any *Gleichschaltung* (or bringing into line) of all parts of health care provision would require massive doses of compulsion at every level. Doctors could not be allowed to set their fees. And if they cannot set their fees they cannot demand more money for working in places and at specialties that seem less desirable to them. So compulsory assignments would again be the inevitable resort of planners who can neither persuade nor pay workers to go along with their schemes. Indeed, since we are a larger, richer, more ornery nation than Great Britain (for example), I doubt that a private practice option could be kept within limits here. Patients would have to be forced to accept their medical care solely from the single national provider. Healing acts between consenting adults would have to be made illegal, unless approved by the government.

The menace is real. Egalitarian ideals, together with an understandable reluctance to pay or to ask one's supporters to pay the cost of these ideals, make the temptation to resort to conscription—to personal compulsion—almost irresistible. It starts with the doctors, goes on to the lawyers, and eventually gets to all young people so that the rest of us can have an army without really paying for it. Then perhaps we would conscript teachers, and finally we would find that everybody is so useful, or so unique, or so much affected with a public interest, that we all may be drafted into the service of the state. Which only demonstrates once again that whoever finds arguments to justify the loss of his fellow citizen's liberty is destined to lose his own. ■

[O]nce again . . . whoever finds arguments to justify the loss of his fellow citizen's liberty is destined to lose his own.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Talk of regulatory reform used to focus on the substance of particular regulatory programs. Now the effort in Congress is mostly absorbed with proposals for changing basic procedures in the regulatory system as a whole. Even traditional champions of regulation cheer these proposals, claiming they will meet public concerns about excessive regulation. Will they? Below are two hopeful views from Congress and a less sanguine view from the Academy.

For Effectiveness and Efficiency: S. 262

Abe Ribicoff

THE YEAR FOR IMPROVING federal regulation has arrived. The momentum for reform is strong, and Congress is in a receptive mood. No fewer than fifteen regulatory reform proposals are pending before the Senate Governmental Affairs Committee, and action on those bills is a top committee priority. Moreover, the President has reiterated his commitment to more effective federal regulation by proposing a comprehensive reform measure.

Some of the proposals would require federal agencies to conduct and publish impact statements for proposed major regulations. The one that I introduced on January 31, S. 262, would require all federal regulatory agencies to consider the costs, benefits, and alternatives before issuing their rules and regulations in final form. This "Reform of Federal Regulation Act" now has thirty-one sponsors, including six committee chairmen.

Abe Ribicoff was elected to the U.S. Senate from Connecticut in 1962 after serving as U.S. Representative (1949–53), governor of Connecticut (1955–61), and secretary of health, education, and welfare (1961–62).

Federal regulation certainly has its problems. The committee's three-year *Study on Federal Regulation* (whose final volumes were published this year) identified and considered a wide range of concerns, including (1) lack of opportunity for public participation, (2) the close ties often existing between the regulated and those subject to regulation, (3) wasteful paperwork burden, (4) overlapping and duplication of responsibilities, (5) undue delay, (6) economic problems created by restrictions on entry and competition, and (7) questions on the cost and effectiveness of some "social" regulation. Despite these concerns, I believe that much federal regulation serves important purposes and needs to be continued. The question therefore is how we can make regulation better. The answer is not to set up new political controls on regulatory decision-making, but to create mechanisms that would ensure more systematic consideration of proposed rules.

A number of recent studies have pointed out the high costs of regulation. One of these, Arthur Andersen and Co.'s study for the Business Roundtable, found that forty-eight ma-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

jor companies spent $2.6 billion in 1977 to comply with federal regulation in just six selected areas. We need to get a handle on these costs —to know what they are and how to minimize them. But we must keep in mind that the costs of inaction may be higher still. For example, according to EPA Administrator Douglas Costle, Hooker Chemical could have spent $1.5 million back in the 1950s to build a landfill for the company's toxic wastes, but instead it dumped them into the Love Canal. That action has already cost New York State some $23 million and, if Hooker Chemical is found liable for the health claims brought against it, might cost the company $2 billion. Complying with regulation is often, on balance, a better bargain for society and for the regulated than the painful consequences or costly remedies that may be the result when regulation is sidestepped or nonexistent.

It is equally clear that government intervention can save consumers money. Take the case of brand-name and generic drugs. If a consumer buys a common tranquilizer under its heavily advertised brand name (Equanil), the price is $7.50 per hundred, while if the same drug is purchased by its generic name (meprobamate), as little as 94 cents will be paid for the same quantity. That may be an extreme example. All the same, it is estimated that FTC's and FDA's proposals for encouraging greater reliance on generic drugs may cut as much as $400 million from the nation's annual $8 billion drug bill.

Principles of Reform

In considering the matter of cost-benefit analysis, it is necessary to make a distinction between two classes of regulation—economic regulation and regulation for the protection of health, safety, and the environment. These two classes have different purposes, present different measurement problems, and require different kinds of solutions.

Where economic regulation is concerned, the main costs are usually not compliance costs imposed on industry, but increased service expense for the consumer. As FTC Chairman Michael Pertschuk has put it, economic regulation is frequently "by business, of business, and for business." It may be possible to eliminate this class of federal regulation. For example, I think the consumer would derive much benefit from the lifting of federal controls on the trucking industry. A virtually identical approach worked with the airlines, where the phasing out of traditional controls by the Civil Aeronautics Board aided not only the consumer but also the industry. And we should note that economic deregulation of the airlines has not cut into the Federal Aviation Administration's responsibilities for air traffic safety.

Thus, in the economic area, we should start with the question, Is regulation in this area necessary at all? But we cannot take this approach to health, safety, and environmental regulations. This is not to say, however, that we should ignore their costs. We should be looking for the most efficient and least costly means to achieve our goals, since there can be no justification for *wasting* resources.

The requirement for regulatory impact analyses in S. 262 will make a major contribution in this regard. S. 262 embodies three guiding principles advanced in the committee's *Study on Federal Regulation.*

First, impact analysis should be viewed as a useful *tool* for decision-making, not as a *rule* for determining whether a regulation should be issued. This is so because of the difficulty in quantifying benefits, and often costs as well—particularly in the fields of health, safety, and environment. Even the Business Roundtable study—which drew on the combined resources of some of the major U.S. companies, the talents of a leading accounting firm, and a research investment of hundreds of thousands of dollars—acknowledged major difficulties in reaching accurate cost estimates. Since we cannot, at this time, expect very much from the existing methods for determining costs—and certainly not for determining countervailing benefits—the decision on a regulation cannot turn only on cost-benefit calculations.

Second, it is not desirable to add further costly steps to the regulatory process. The requirement for economic impact evaluations should be as comprehensive as possible, but it should not be so complex and elaborate that it creates additional expense, delay, and confusion.

Third, in order to have the advantage of agency expertise, the analysis should be conducted *within* the department or agency con-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

sidering a particular action. The adequacy and objectivity of in-agency analyses can be ensured through congressional oversight and by outside periodic review of impact statements.

The "Reform of Federal Regulation Act"

In accordance with these principles, S. 262 would require that every federal department and agency prepare a detailed analysis of the projected economic effects and the projected health, safety, and other "noneconomic" effects likely to result from a major proposed rule. This requirement would cover independent regulatory commissions, which currently are exempt from the impact analysis requirement of Executive Order 12044, issued in 1978. I am convinced that requiring *all* agencies to give systematic consideration to the economic impact of their proposals will produce more thoughtful final decisions.

The impact analysis will involve two steps. In order to expedite the regulatory process and encourage timely public discussion, a draft analysis would accompany the proposed regulations when they are first published for comment. This draft would contain a concise statement of the need for the proposed action along with any practical alternatives, giving in each case a preliminary estimate of impact (including economic impact) and relative effectiveness. Subsequently, after allowing at least sixty days for public comment on the initial analysis, the final regulations along with an even more detailed impact analysis would be issued.

Such analysis would be required, however, only if the statutory mandate of the agency permits costs and other external considerations to be taken into account. Some statutes direct that agency decisions be made solely on the basis of health and safety considerations. It is difficult to determine how an impact analysis requirement would work in those instances and, in any case, we do not want to reverse years of congressional action and deliberation by changing those statutes in this way.

Compliance oversight would rest with Congress. The Congressional Budget Office would periodically review the regulatory impact analyses of the agencies in order to ensure adequate agency compliance. The CBO reviews would be reported to the public, the Congress, and the agencies performing the analysis. Judicial review of an agency's analysis procedures would be precluded in order to avoid lengthy litigation and the delay that produces. Court review would, of course, remain available for the regulation itself.

The bill contains other important provisions. For example, it would require agencies to establish priorities and reasonable deadlines for action and would also encourage the use of more informal procedures to cut down the amount of time spent on trial-type proceedings. In addition, it would require agencies to determine which *existing* regulations need reexamination and to publish a general plan for the review of those rules every five years.

I am pleased that the President's regulatory reform proposal, S. 755, parallels my bill in many respects. While there are differences, S. 755 does reflect the fact that the committee worked closely with the executive branch in identifying the problems and fashioning the needed reforms.

I would like to close with a final point on presidential review of regulatory decisions. Regulations should be considered on the public record, not behind closed doors. Recently there have been problems in this regard. In private meetings with agency heads, the President's economic advisers have pressed for changes in regulations, *after* the public comment period has ended. And changes have been made—on cost-benefit grounds—even in cases where the statutes provide that decisions be based *solely* on health and safety criteria. Recent smog and strip-mining rules have been modified, apparently as a result of White House influence.

When that occurs, are the discussions recorded and made part of the agency's record? Does the public have a chance to respond? How can a court review arguments and facts presented in secret conversations? Why should the judgments of admittedly unelected regulators be replaced with those of unelected White House staff members? Is it advisable to create yet another bureaucratic layer in the White House, with its often limited resources for dealing with complex regulatory issues?

I question whether a presidential "regulatory veto" protects the public's right to a fair process. There is, I believe, a better way. As is recommended in volume five of our study, presidential participation should take place on the public record and *at the beginning of the*

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

process—not *at the end*, when the public has no chance to comment. In that way, due process can be guaranteed, and agencies can still be *required* to consider important national concerns—such as inflation and paperwork—in drafting their regulations.

I am convinced that our approach will increase accountability as well as the opportunity for presidential leadership. Assume, for example, that EPA proposed a regulation contrary to established national energy policies. Under our proposal, the White House could do one of two things: it could formally intervene in the process, arguing against the proposed policy; or it could propose an alternate approach which the agency would have to consider within a set deadline. In either case, the agency would certainly respond, because regulators do not operate in a vacuum. In my experience, they are highly sensitive to administration objectives—a sensitivity prompted by the President's appointment and budget powers. Serious and timely consideration would be given to the President's viewpoints, and national leadership would be asserted in a *public* context.

We must not cripple the ability of agencies to discharge their statutory duties. Nor should we lose sight of the important purposes served by health, safety, and environmental controls. What the people want is effective and efficient regulation. And that is the objective of S. 262. ■

On the New Regulatory Reformers

A More Demanding Standard: The Brown-Bentsen Bills

Clarence J. Brown

PUBLIC REACTION to burdensome regulation may turn out to be for the current Congress what Proposition 13 was to taxes and deficits in the last Congress—a force demanding change in government policy. Today, the cumulative *Federal Register* fills fifty-two large bookshelves and totals over 800,000 pages. The stack of volumes has grown in the past twenty years from ankle level to higher than I can reach—and I stand over six feet four inches tall. We are drowning in the flood of printed regulations.

Though this is a graphic illustration, shelf space for the *Federal Register* is not of course what concerns me. Rather, I am concerned about the costs these regulations impose on our economy—costs which Murray Weidenbaum's recent study for the Joint Economic Committee put at $102.7 billion (including private sector compliance costs of $97.9 billion and agency administrative costs of $4.8 billion).

No one wants to repeal regulatory policies that produce substantial benefits for the public. But some regulatory programs impose excessive and unintended costs, often far exceeding the benefits they yield.

The Brown-Bentsen Bills

This is a problem we must deal with—and soon. Thus, on the first day of the ninety-sixth Congress, I introduced in the House and Senator

Clarence J. Brown, elected to the House of Representatives from Ohio in 1965, has been a member of the House Government Operations Committee since 1966.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Lloyd Bentsen (Democrat, Texas) introduced in the Senate a package of four bills that we believe directly addresses the major regulatory problems:

- H.R. 75, "The Regulatory Cost Reduction Act," provides that federal agencies, when they promulgate regulations, must select the most cost-effective method of meeting the regulatory objectives.
- H.R. 76, "The Regulatory Budget Act," provides for a procedure under which Congress would set annually a limit on the amount of private-sector compliance costs each federal agency could require by its regulations.
- H.R. 77, "The Independent Agencies Regulatory Improvements Act," extends the economic analysis requirements of Executive Order 12044 to seventeen independent agencies which, because they are not strictly executive-branch agencies under presidential control, could not be covered constitutionally by an executive order.
- H.R. 78, "The Regulatory Conflicts Elimination Act," provides for a procedure under which conflicting and duplicative federal regulations would be eliminated, since it is senseless for a citizen to be put in the position where complying with one federal regulation requires him to violate another.

These bills should be part of any regulatory reform program enacted during this Congress. Some of the provisions they contain have been included in Senator Ribicoff's regulatory reform bill (S. 262), and many can also be found in the Carter administration's proposal (S. 755).

The main contributions of S. 262 are planning improvements and reform of the administrative procedures in federal regulation. The bill would reduce the serious delays that now plague the regulation process. It would also enhance efficiency in administration and permit better public participation in developing regulation. One of S. 262's controversial provisions is the requirement that government finance citizen group participation in the regulation-writing process. While input from consumers is certainly important, I have some doubt that we can make regulation more effective and less costly simply by supplying federal agencies with more information. Rather than adding (at taxpayer expense) to Ralph Nader's already capable lobbying efforts, we should require the agencies to meet cost-effectiveness standards. The lack of such a requirement is a major gap in S. 262.

The Ribicoff bill does take an important step forward in calling for a regulatory analysis of existing and proposed regulations, but it does not take that next important step—spelled out in H.R. 75—of requiring that agencies adopt the most cost-effective method of regulation consistent with the agency's statutory obligations. Admittedly, a cost-benefit test for government regulations, as desirable as it might be in theory, would present some calculation problems in practice. For most regulatory programs, however, it is not necessary to calculate both costs and benefits—only costs. In enacting these programs, Congress generally presumes or sets a level of benefits to be achieved, just as it does with spending programs. Determining benefit levels is not, and should not be, the business of the administering agency—for it is a legislative function. The agency's function should be to achieve congressionally mandated goals at the lowest cost. There should, in other words, be no need for them to measure benefits; their efforts should be focused on measuring costs, which can be more accurately determined.

My proposals require that regulatory objectives be achieved in the most cost-effective manner, unless the head of the agency decides that the national interest requires the use of a less cost-effective alternative, and clearly explains why. Among the alternatives that should be considered are market disciplines and such approaches as voluntary industry standards. The definition of "costs" in my bills includes both administrative costs incurred by the government and compliance costs incurred by the private sector; but it excludes normal business or record-keeping costs that would have been incurred in the absence of such federal rules or regulations.

The recent study of regulatory costs done for the Business Roundtable by Arthur Andersen and Co. is relevant here. That study identified certain features characteristic of high-cost regulations. Rules requiring a particular compliance action or imposing a product standard rather than a performance standard, rules specifying engineering solutions rather than protective devices, and rules requiring con-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tinuous monitoring—these approaches almost invariably create a heavy cost burden for the private sector. Regulators who are probing for least-cost alternatives will find this study useful.

A Regulatory Budget

The primary contribution of the Brown-Bentsen package that is untouched by either S. 262 or the administration's proposal is the provision for a regulatory budget (H.R. 76). Current procedures fail to recognize that the goals of regulatory programs must be balanced against other national objectives. The achievement of any objective, public or private, uses resources that could be used for other purposes. The more resources devoted to one purpose, the fewer there are available for others. Even if all regulations were cost-effective, there still would be a need to establish priorities for the use of limited resources. This can best be accomplished by requiring Congress to set a regulatory budget.

In the past, the fiscal budget was quite adequate to show the impact of government on the economy, since almost all federal government activities involved direct taxation and direct spending. If one added to these the financial commitments (through loans, guarantees, and insurance) of some fourteen "off-budget" agencies, one could get a fairly clear picture of the government's influence on the economy. But with the recent rapid growth of the new regulatory agencies—the Occupational Health and Safety Administration, the Environmental Protection Agency, the National Highway Traffic Safety Administration, and many others—the fiscal budget no longer conveys a complete picture of government's impact on the economy. Most of the economic effect of regulation is hidden, since government-required private sector spending for auto safety, mine safety, pollution control, and consumer protection, plus the attendant paperwork costs, do not appear in the government's budget figures. They are cloaked in "off-off-budget" spending, required of the private sector to comply with federal regulation.

The clearest example of the need for a budget showing the economic impact of regulation on the society may be seen in the environmental regulation of electric utilities. The massive cost of a smokestack scrubber to achieve cleaner air is passed on directly to consumers, who pay higher utility bills as surely as they pay taxes. But the federal budget fails to show these higher prices. It also fails to show the higher prices consumers pay because of economic regulation by such agencies as the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Communications Commission. The costs and benefits of both social and economic regulations should be more clearly available to policy-makers and to the public.

If these costs were minor, of course, their omission from the budget would not be a serious problem. But they are not minor, and they are growing. It is important, therefore, that the Budget Act of 1974 be amended to require that Congress annually establish a regulatory budget, along with the fiscal budget, to set a limit on the costs of compliance each agency could impose on the private sector in any one year. The timetable and the process provided for developing a regulatory budget under H.R. 76 would be similar to those governing the fiscal budget concurrent resolution. There is, however, a weakness in H.R. 76: it lacks a strong enforcement provision in the event that the budget resolution ceilings are violated. I intend to remedy this weakness.

Section 1107(a) of the bill declares that it shall not "be in order in either the House of Representatives or the Senate to consider any bill, resolution, or amendment . . . if enactment . . . would cause the level of costs of compliance for any agency to exceed the maximum costs of compliance established for that agency in the concurrent resolution. . . ." I doubt Congress would violate its own law and, even if it did, I doubt it would punish itself. But the provision is primarily directed against an agency's writing a regulation that would lift compliance costs above the ceiling. I am considering some options to forestall regulatory budget busting. One option would be a procedure to permit suits against the government in such a case. Another would be to reduce the fiscal budget of any agency that imposed compliance costs in excess of its regulatory budget ceiling.

Whatever its ultimate form, a regulatory budget would provide an incentive for the regulatory agencies to limit the compliance costs

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

that their regulations impose. It would certainly make the agencies more conscious of those costs. But it would have other important effects as well. A regulatory budget, along with the fiscal budget, would provide a more accurate picture of the federal government's total impact on the economy, allowing Congress to determine how much of the nation's output is to be devoted to public uses and how much left to private uses. It would make possible a better balance between regulatory programs and traditional government spending programs. It would enhance the protection of the public's health and safety by requiring that the federal government establish consistent priorities in pursuing regulatory objectives. The semiannual regulatory calendar, the first of which was published by the Regulatory Council on February 28, 1979, could prove to be an important step toward a regulatory budget.

Although some regulatory costs are difficult to measure with current techniques, many costs are measurable, including the costs of required investment, paperwork, and changes in product quality. This is shown by the Business Roundtable's study. So, while I recognize that techniques for assessing regulatory costs are not fully developed, we have made some beginnings. And since the effective date of H.R. 76 would start with the fiscal year at least eighteen months after enactment, there would be time to solve the practical problems that remain. But we need the spur. H.R. 76 should be enacted as soon as possible. ■

On the New Regulatory Reformers

Reform as Totem— A Skeptical View

Ernest Gellhorn

ONE OF THE NATURAL WONDERS of the world is a place called Ayers Rock in the middle of the Australian Outback. There, rising out of a trackless desert, is the world's largest monolith. Massive and majestic, it is a sacred object of worship to the Aborigines of the Great Plateau. Though they do not know what it is for or how it got there, legend has it that the natives make frequent pilgrimages to it in order to show their reverence, which they do by scrawling primitive graffiti over its base.

Regulatory reform appears to be America's counterpart to Ayers Rock. No leader, it seems, can pass this totem without a bow of respect and a new proposal in legal hieroglyph. Few topics guarantee more attention from the press —and less understanding. It is a subject of universal favor. But it remains uncertain whether these propitiary offerings to the idol of reform will really have any effect on the problems of regulation.

Reformers have approached regulatory problems in recent times from three different directions. First, some concentrate on Congress, urging closer control of the agencies by intensifying committee oversight or adopting devices such as the one-house legislative veto. Second, others challenge the validity of entire programs, urging deregulation—as in the case of ICC controls of trucks and railroads—or proposing generic sunset laws that would allow

Ernest Gellhorn is dean and professor of law, University of Washington.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

regulatory programs to lapse unless specifically renewed. Despite recent indications that congressional oversight can be quite effective and that specific deregulation can be spectacularly successful (as with airlines), Congress now seems preoccupied with a third approach to regulatory reform. This group of proposals assumes the desirability of and need for most regulation, and seeks to improve regulatory operation by concentrating on decision-making within the agencies. While the Ribicoff, Brown-Bentsen, and Carter administration bills vary widely in some particulars, each would require that every administrative agency, before adopting new regulations, assess the cost and benefits of the proposal. But they would still leave the hard decisions to the agencies themselves.

The appeal of this third approach is easy to appreciate when one totes up the vested rights and political strengths enjoyed by the beneficiaries of particular programs. For some, such as ICC-regulated permit holders or Teamsters employed to drive empty backhauls, the benefits run into billions; to the public, of course, these are among the heavy cost burdens of regulation. Are procedural reforms, then, really much more than a brief circus to go with the thinner bread of these inflationary times? Judging by past efforts and recent experience, the prospects for significant improvement are not particularly hopeful. One thing is clear: implementing any of these proposals would add another cumbersome step to an already ponderous process and lead to still larger agency and congressional staffs. If real reform resulted and administrative costs were, as a consequence, reduced, neither point would constitute a serious objection.

In fact, however, the prospects for such internal regulatory reforms in the agencies seem slim, at least as these bills are currently drafted. Their central provisions have already been implemented by President Carter's 1978 executive order that requires agencies subject to presidential direction to undertake an economic analysis of proposed regulations involving substantial burdens on the economy. The Carter order itself was essentially a revival of an order first issued by President Ford five years ago. Several years of these experiments, however, have certainly not lifted the curse of costly, ineffective, unnecessary, bothersome, and duplicative regulations. There is no reason to suppose that better results will now be achieved simply by extending this regulatory impact requirement to the independent agencies not reached by prior presidential orders.

The Enforcement Problem

One of the most serious defects in the Carter order is its lack of any enforcement provision. To be sure, the usual reports must be submitted to the Office of Management and Budget (OMB) or to interagency monitors, but there is no penalty for noncompliance, nor any incentive to follow the spirit of the cost-benefit approach. This problem of nonenforcement is compounded in the Carter administration and Ribicoff bills, for they bow to fears of delay and interference from judicial review by explicitly precluding any judicial enforcement of regulatory analysis requirements. This effort seems unwise, and is unlikely to be successful. There is no reason to expect hortatory legislation to be any more effective than presidential exhortations. And experience with earlier congressional attempts to limit judicial review (as in the case of Clean Air Act emission standards) demonstrates that restrictions on judicial review are futile. They only encourage constitutional challenges and result in narrow or forced misreadings of the agency's statutory authority. Regardless of what the bills say, judicial review will somehow be made available. The only question is whether this fact is recognized now or after numerous appeals and several years of uncertainty. The explicit authorization of judicial review in the Brown-Bentsen bill is much more realistic. (On the other hand, its introduction of a new judicial review standard—a "deliberate or capricious disregard" of congressional intent—may simply add a confusing note to judicial proceedings.)

Even with the possibility of ultimate judicial enforcement, however, these proposals may not have much effect on the general pattern of agency decisions. Under the best of circumstances, judicial review only protects against extreme administrative abuses, serving as a warning or a standard for routine operations. The courts cannot possibly review every decision of a regulatory body. For these proposals to be effective, then, there must be some instrument to ensure routine compliance with the impact analysis requirements.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

None of the present proposals, however, provides for meaningful authority to monitor compliance. Instead, they all rely primarily on the cooperative spirit of the regulators themselves. But since it is the regulators who are the problem, or at least a substantial part of it, one may wonder how effective this sort of remedy really can be; the rule against having foxes guard henhouses comes to mind. To be sure, all of the bills nominally provide for some outside monitoring: under the different proposals, agencies would have to file reports on their activity, variously, with the Congressional Budget Office, the Administrative Conference, the Comptroller General, or OMB. But none of the bills assigns direct responsibility for enforcement to these various monitors. As a practical matter they would probably function as filing repositories for meaningless paperwork. Certainly current experience with this "public lists and reports" approach—as reflected, for example, in the executive order program—suggests that the regulatory agencies are not going to be moved merely by moral suasion.

The Need for Central Review

If a regulatory impact requirement is actually to change agency decision-making, it should be enforced by a central agency speaking with the authority of the President or empowered to suspend rules and recommend reconsideration in light of cost or feasibility considerations. OMB would seem to be the appropriate candidate for this task since it already has developed a good deal of relevant expertise and experience in the course of its budget review activities. It could in any case develop the necessary capabilities with relative ease and without major growth in the bureaucracy (at least by comparison with the alternatives). How and by what terms this oversight responsibility should be arranged is a problem that deserves much close study and thoughtful analysis. The current proposals have not really begun to come to grips with the enforcement problem—a failing that may render all their other provisions largely futile.

The failure to provide for a centralized enforcement mechanism doubtless reflects, in some degree, an underlying congressional fear that such oversight might weaken or divert regulatory activity in behalf of health, safety, environmental and other laudible concerns. Such caution will probably ensure that cost considerations remain rather peripheral to the rule-making and standard-setting activity of many agencies. Yet in the long run the effectiveness and viability of federal regulation demands that costs be given as careful consideration as needs and benefits. For regulatory programs constitute a claim on the finite resources of the nation, as much as taxation and government spending. We cannot make rational decisions about the appropriate type of regulatory requirements to impose without fairly clear assessments of the relative costs of alternative options. Yet none of the present proposals provides for the sort of centralized control over regulatory costs that we currently maintain over federal expenditures.

The Brown-Bentsen regulatory budget looks at first like an easy short-cut to this goal. This proposal would establish an outer limit on the costs each agency could impose on regulated firms or institutions. Congress would be called upon to determine an overall regulatory cost budget as well as a specific budget for each agency. The scheme would thus retain agency control over regulatory programs, while highlighting for Congress its responsibility for deciding where and at what level regulatory cost burdens should lie.

While the general idea of a regulatory budget sounds promising, it does have some serious weaknesses. In the first place, one may doubt whether Congress or the agencies themselves would be able to anticipate the costs of particular regulatory schemes with much accuracy. Attempts by economists to calculate regulatory costs, both program-by-program and in the aggregate, have varied widely and been imprecise at best. Problems of attribution would be likely to generate as much controversy and confusion as questions of prediction: when the National Highway Traffic Safety Administration specifies the precise quality and placement of turn signals on new cars, for example, are the full costs of compliance to be charged to NHTSA's regulatory budget—even though most auto companies would have included the item in some form anyway? Whatever its appeal in principle, the regulatory budget might offer too many opportunities for evasion and self-delusion—given the difficulty of calculating costs—to be very useful in practice.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

It also has certain basic conceptual problems. In mandating a cost ceiling, the Brown-Bentsen budget bill directs the regulators' attention to limiting expenses rather than to improving the ratio of costs to benefits. This would, of course, make sense if Congress had some idea of what costs it was willing to have imposed (and no corresponding ideas about the level of necessary or desired benefits). But that will not often be the case. Consider the NRC's enforcement of safeguards in the nuclear power industry: would we really want that commission to accept newly discovered risks (say, from design inadequacies revealed at Three Mile Island) simply because it had already imposed compliance costs on the industry reaching the mandated level?

These questions of implementation are common to all of the regulatory reform proposals. They all attempt to superimpose a single mechanical remedy on very disparate agencies dealing with complex and unrelated problems. In doing so, each proposes substantial additions to the Administrative Procedure Act and so would further complicate its already convoluted structure. Nor is it just a purist's objection to note that each of these reform bills ignores its own mandate to eliminate excessive regulation and to write rules in simple, plain, and understandable English. Written in the awkward style of government prose and using such terms as "cost effectiveness," they stand as further evidence of Congress's organizing principle—"do as I say, not as I do."

No Easy Answers

The underlying problem with the proposals is that they have all proceeded as if the current regulatory malaise has one single cause. But the problems of the administrative process are many; most are peculiar to a specific agency or subject. Even where general principles or common threads seem identifiable, their application will vary and they must be tailored to the particular problem at hand.

A realistic reform effort will not only shun simple solutions to complex problems, but it will also establish necessary priorities. Thus the first order for regulatory reform must be a systematic congressional program to examine and, where possible, cut back existing regulatory authorizations. Interstate Commerce Commission control of railroads and trucking seems a prime candidate, but there are many others. A second and closely related priority is for Congress to give the agencies more precise directions. It simply must face the hard questions and make basic value choices instead of always passing these questions to the agencies. Finally, as a third step, Congress needs to restructure and consolidate that regulatory authority which is to remain. Historical accident and interest group pressures rather than reason explain the division of transportation responsibilities among at least four agencies and departments, consumer protection among a like number, and antitrust between two. If conflicting and duplicative regulation is a worry, the proper remedy is to be found in Congress which is the original source of overlapping and conflicting authority.

Within this larger context, some version of the impact analysis requirement can make a useful contribution. Even then it needs revision so that a central review authority is given genuine oversight powers. Congress must also take the trouble to tailor this requirement to the special circumstances of particular agencies, so that what is required of NHTSA, for example, is not mindlessly mandated for NRC in the same stroke. In the final analysis, however, there is no substitute for the appointment of qualified agency leadership, leaders who understand the limits of their role, who are sensitive to the economic burdens of regulation and the ease with which authority can be abused. There can be no escaping the need for continuous and intense congressional and presidential oversight to ensure that the agencies are indeed being properly directed.

Reforms invariably go astray when they attempt to impose a plausible abstraction on an intractably complex and confusing reality. As George Bernard Shaw put it, "Reformers have the idea that change can be achieved by brute sanity." That is an apt summary of the strengths and weaknesses of these newest proposals for regulatory reform. Senator Ribicoff says that this is the "year for improving federal regulation." The Chinese say it is the year of the ram. Both may be right. It nonetheless seems safe to predict that by year's end Ayers Rock will be standing as it has before and the true path to regulatory reform will continue to elude us. ■

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

REGULATORS AND RELIGION: CAESAR'S REVENGE

Allan C. Carlson

THE ROMAN CATHOLIC bishops of the United States spend a full session during their November 1978 assembly discussing governmental "intrusion" into church affairs. . . . The Lutheran Council in the U.S.A. convenes representatives from seven sometimes quarreling Lutheran bodies in early 1979 to explore the troubling implications of federal activity affecting the church community. . . . The governing board of the National Council of Churches of Christ, not recently known for opposing other extensions of governmental authority, approves a resolution at its November 1978 session calling on churches to resist regulation. . . . Something has clearly unsettled the relationship between government and organized religion.

The disturbing element is the recent growth in the number of bureaucratic rules, regulations, and related administrative requirements affecting the church community. Religious organizations are seeing their activities and autonomy compromised directly by new or threatened state controls and compromised indirectly by governmental definitions that confine unrestricted "church activity" to an ever smaller circle.

There are, of course, constitutional limits to how far this can go, but they are neither as restrictive nor as clear as one might imagine. The "free exercise" clause of the First Amendment does provide strong constraints against governmental meddling in doctrinal questions and in liturgical or ceremonial practices. This has never meant, however, that *all* activities of religious institutions are immune from state controls, and as government regulation—through both the stick and the carrot—has expanded in our society, its power over religious institutions has become considerable. The churches fear that what is God's is increasingly being rendered unto Caesar.

Allan C. Carlson, formerly assistant director of the Office for Governmental Affairs, Lutheran Council in the U.S.A., is currently a National Endowment for the Humanities fellow at the American Enterprise Institute.

Churches Meet the Social Engineers

Joining most other private institutions, the churches are facing for the first time the discomfiting adjustments demanded by a bureaucratic state pursuing a set of abstract policy goals. Social regulation has spread far beyond its once limited domain. The government's commitment to an "affirmative" vision of individual and group equality and to augmented collective security, together with state protection of a new set of "rights" unknown several decades ago, is altering the religious community.

Churches and their related agencies and schools are subject to the major statutes and implementing regulations designed to seek various forms of equality. Special provisions found in the Civil Rights Act of 1964 as amend-

NOTE: This essay follows the general, albeit hazy, practice of extending the "church" label to synagogues, temples, mosques, and their assorted hierarchies, together with "para-churches" such as Young Life.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ed and in Title IX (sex discrimination) of the Education Amendments of 1972 allow church institutions to practice religious and sexual discrimination in hiring and educational practices only where doctrinal matters are involved. Section 504 (equal opportunities and access for the handicapped) of the Rehabilitation Act of 1973 and the entire Age Discrimination in Employment Act of 1967 as amended contain no special religious exemptions.

Many denominations supported these and similar measures as matters of social justice. Until recently, most denominations have followed federal requirements without abnormal amounts of friction. But conflicts are now emerging as certain churches and related institutions refuse, on grounds of religious liberty, to comply with federal directives. For example, the Equal Employment Opportunity Commission recently took the Southwest Baptist Seminary to court demanding information on the number, duties, tenure, pay, sex, race, and national origin of its employees. The Department of Labor has brought suit against the Pacific Union Conference of the Seventh-Day Adventist Church, charging it with violating the Fair Labor Standards Act by not providing equal pay to male and female school administrators and teachers. Both religious organizations say the matters questioned are internal religious affairs not subject to federal review.

. . . conflicts are now emerging as certain churches and related institutions refuse, on grounds of religious liberty, to comply with federal directives.

The Internal Revenue Service has also attempted to advance a social policy affecting the church community. In August 1978 the agency proposed a "revenue procedure" that would have conditioned federal tax exemption for church-sponsored and other private schools on a new racial minority enrollment quota test. It would have established an administrative category, "reviewable school"—defined as a school adjudged to have a racially discriminatory policy, or "formed or substantially expanded" near the time of a public school desegregation decree in the community served by the school and having a minority student percentage less than 20 percent of the proportion of minority children in the school's "community." The latter term was defined as the public school district where the private school was located and any other district from which the school drew at least 5 percent of its enrollment. Under the proposal, "reviewable schools" were presumed to be racially discriminatory and consequently subject to losing their exempt status unless they could prove their innocence to the IRS by meeting four out of five other minority sensitive tests.

The IRS added that "other schools" neither adjudged discriminatory nor classifiable as "reviewable schools" would be considered reviewable if they had what the agency considered to be an insubstantial minority enrollment. In addition, private colleges and universities would be covered by the procedure "in appropriate cases."

Following a flood of 100,000 largely negative written comments, the appearance of over two hundred mostly hostile witnesses at an IRS public hearing in December, more hearings by the Oversight Subcommittee of the House Ways and Means Committee in February 1979, and consultations with church and private school officials, the IRS released a modified proposal on February 9. In it, the 20 percent minority enrollment quota becomes a "safe harbor" for a given school, ensuring automatic nonreview. The definition of "community" also is made more flexible. The proposal specifies that a school can be "reviewable" only if its formation or substantial expansion was "related in fact," not in circumstance, to public school desegregation. IRS agents would have substantial leeway in judging the growth patterns, religious nature, and special attributes of individual schools that did not meet the percentage test, while an automatic appeal of adverse rulings to the IRS national office would theoretically ensure the procedure's equal application. Colleges, universities, and preschools would not be affected by the proposal.

In general, the thrust of this alternative has the support of the U.S. Catholic Conference and the Lutheran Church–Missouri Synod, representing the nation's two largest parochial school systems. But many evangelical and independent Christian schools, joined by strict church-state separationists, remain opposed.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

In another attempted expansion of bureaucratic domain, the National Labor Relations Board (NLRB) decided in 1975 to exercise jurisdiction over labor-management relations in the Roman Catholic elementary and secondary school system. While there is no express religious exemption in the National Labor Relations Act, the board had hitherto declined jurisdiction over church-sponsored schools. (Public schools, interestingly enough, *are* exempt from the act, which left the federal government in the awkward pose of asserting more authority over privately funded, church-run schools than over state schools partly supported by federal tax dollars.)

To justify its decision, the NLRB claimed a compelling state interest in protecting the collective bargaining rights of parochial school teachers, and promised to stick to "secular matters" so as not to require church employers to take actions inconsistent with their religious beliefs. Roman Catholic bishops argued, however, that the free exercise clause of the First Amendment guarantees to churches the right to maintain institutional as well as doctrinal integrity in the face of government action. And, they added, only churches can decide when their nature is being or would be altered by state intrusion. The bishops insisted that NLRB jurisdiction over parochial school teachers would compromise the church's authority to ensure teaching practices compatible with the Roman Catholic faith.

On March 21, 1979, the Supreme Court overturned the NLRB action in a 5–4 decision. The majority argued that since Congress had not specifically considered church-sponsored schools when drafting the National Labor Relations Act, the Court should not interpret that measure in a manner forcing it to resolve "difficult and sensitive" First Amendment questions. The minority criticized the Court's creation of a new exemption for church-sponsored schools and accused the majority of being "irresponsible" in avoiding resolution of the First Amendment issue.

Even the Federal Trade Commission (FTC) has tried to carve out a slice of the ecclesiastical pie. Legislation introduced in the last Congress at the behest of FTC staff would have modified the commission's governing statute (which defines corporations subject to FTC regulation) to include for the first time "not-for-profit organizations, incorporated or unincorporated, which conduct activities in or affecting commerce. . . ." FTC frustration over its inability to deal with an unnamed "Christian college" involved in questionable advertising practices was one informally cited justification for this claim of jurisdiction.

The Price of Involvement

Since the 1930s, the federal government has exacted a price for granting organizations exemption from income tax and eligibility to receive deductible charitable contributions. Section 501(c)(3) of the Internal Revenue Code, which confers exemption on educational, charitable, religious, and certain other entities, requires that "no substantial part" of their activities be "carrying on propaganda or otherwise attempting to influence legislation." The provision also stipulates that qualifying groups may not "participate, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office."

While churches have long exerted influence on public policy questions (a revealing example is the early twentieth-century campaign for Prohibition), the civil rights and anti-war activism of the 1960s stimulated stronger institutional commitments to such involvement. Many churches now consider "advocacy" on public issues to be part of their religious mission and assert a constitutional immunity from the 501(c)(3) lobbying restraints. For the same reasons, churches insisted upon and won their exclusion from a provision in the Tax Reform Act of 1976—a provision supported by most secular "501(c)(3)s"—that effectively defined in broad percentage and dollar terms the limits of insubstantial lobbying. Some also actively opposed lobbying disclosure legislation considered by the 94th and 95th congresses, rejecting all proposed registration and reporting requirements as infringements on their freedoms of speech, assembly, and religion.

Direct IRS challenges to churches under the "substantial lobbying" test are still infrequent. On the one hand, the agency has been somewhat skittish about creating "martyrs" over the church lobbying issue. On the other, churches with active advocacy arms and exten-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

sive involvement in political and social issues are deeply committed to such activities and, in any case, usually protected by their much larger budgets for other areas of their work. The IRS did revoke the exempt status of and collect back taxes from the avowedly anti-Communist "Christian Echoes National Ministry" of Billy Joe Hargis in 1968. Three years later, it also conducted an audit of the National Council of Churches largely to determine whether that body had exceeded allowable limits on political and legislative activity. But the effect of the substantiality clause on the church community has been mostly to discourage religious bodies of a more quietistic, evangelical, or conservative nature from partipicating in the public debate. Such groups tend to be smaller (making any sum potentially substantial), less prone theologically to view "advocacy" as a necessary part of their mission, and less willing to risk testing the limits of an extremely vague provision.

The "political campaign" clause of section 501(c)(3) is subject to more evident new bureaucratic controls. Churches interpreted this provision and its implementing regulations to prohibit only partisan political involvement. Many exempt bodies, including religious groups, carried on such "political education" endeavors as the publication of congressional voting records or the polling of candidates on public issues. But an IRS ruling of May 1978 sharply narrowed the sphere of acceptable political education work. It stated that a nonprofit educational organization that mailed questionnaires to political candidates and published their replies (without editorializing) in a newsletter did not qualify for 501(c)(3) status. The "political campaign" restrictions found in the section, according to the IRS, referred not only "to participation or intervention with a partisan motive, but to any participation or intervention which affects voter acceptance or rejection of a candidate."

Responding to widespread criticism, the IRS withdrew the rule a month later and issued a new one, apparently more lenient and certainly more obscure than its predecessor. It specified that some voter education activities "conducted in a nonpartisan manner may not constitute prohibited political activity," while others may. Examples of acceptable activity were (1) publishing the voting records of all members of Congress on a wide range of legislative issues and without editorial comment and (2) publishing the solicited responses of candidates on issues "selected by the organizations solely on the basis of their importance and interest to the electorate as a whole," without bias or preference. Proscribed activities were (1) publishing political candidate responses to a questionnaire where "some questions evidence bias on certain issues" and (2) publishing incumbents' voting records on "a narrow range of issues," even if presented without bias.

With key terms such as "bias," "wide range," and "narrow range" undefined, the IRS action has had a chilling effect on several religious social action bodies. In January 1979 the United Church of Christ announced its intention to challenge the rule on religious liberty grounds, but subsequently backed away, unwilling to risk loss of its exempt status.

"The Root of All Evils"?

The will-o'-the-wisp attractions of government money have lured elements of the church community deeper into the bureaucratic quagmire. Despite constitutional restraints on direct financial assistance to religious organizations, many church-sponsored colleges and universities, hospitals, and agencies are eligible (as voluntary nonprofit organizations) to receive monetary support from a variety of federal programs. The appeal of dollars to be used for expansion or improved services has generally outweighed a residual queasiness among church, school, and agency administrators over accepting federal funds with the regulatory and other strings invariably attached.

The will-o'-the-wisp attractions of government money have lured elements of the church community deeper into the bureaucratic quagmire.

Over the past decade inflation has increased the pressure for access to governmental treasuries. Churches (more than secular charities) depend financially on relatively small givers drawn from the middle and lower-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

middle classes. As inflation nears the double-digit level, these givers find their own real incomes leveling off or declining and tend to reduce real giving as one of the few personal expenses they are still able to control. At the same time, inflation diminishes the real value of endowments upon which church schools and agencies often depend.

Consequently, church-sponsored institutions increasingly turn to direct federal grant, loan, or capital programs under Title XX of the Social Security Act, Titles I and III of the Higher Education Act of 1965, section 202 of the Housing Act of 1949, the Older Americans Act of 1972, or the "Hill-Burton" hospital and nursing home construction program. Additional eligibility, reporting, accounting, and affirmative action requirements follow. State and federal student-aid benefits and various federal welfare or social insurance programs provide other forms of indirect (but still regulation-encumbered) assistance.

One annoying result is the growing amount of paperwork needed to account properly for the use of federal funds and to document compliance with other governmental requirements. While there are few hard data, informal consultation with Lutheran social agency executives suggests they tend to spend 15 to 35 percent of their time meeting federal, state, and local regulatory requirements. Personnel and resources are diverted from program work, and administrative staff swells. Another result is the appearance of grantsmen. Since money is available only for certain programs, and grant seekers obviously aim for what is available, schools and agencies often come to base their program decisions on available funding and governmental biases rather than on their own perceptions of social need.

The use of governmental funds undermines other aspects of institutional autonomy. Unpaid volunteer boards of directors often succumb to regulatory complexity and confusion and tend to rely on government initiatives and rules to guide the church-related institution. They will almost certainly become less willing to experiment with new approaches, challenge unreasonable or illegal governmental requirements, or take controversial stands. The fear of losing or not receiving essential program dollars must ultimately be a powerful incentive for compliance and silence.

Reliance on federal dollars also leads to an erosion of the tie between the receiving church-related institution and the sponsoring church itself. For example, guidelines adapted by HEW's Office of Education from court decisions generally prohibit funding where part of a college's faculty would be used for "sectarian activity," where religious worship is a consistent or continuing activity or where students are trained to enter religious vocations, even when a large share of the coursework is secular. The Law Enforcement Assistance Administration of the Department of Justice has conditioned grants to church-sponsored institutions under several of its programs (alcoholic treatment or "work-release," for example) on church-relatedness—the closer the religious connection, the less the prospects for grant approval. Facing such requirements, institutions actively seeking funds will de-emphasize their church relationship and religious character.

Blessed Are the Exempt

Some regulatory and rulemaking problems come about from difficulties in defining the terminology used to set the boundaries for churches as distinct legal entities enjoying unique exemptions and benefits. The Internal Revenue Code alone contains at least nineteen religious terms, including "church," "religious purposes," "church agency," "integrated auxiliaries" of a church, "church plans," "a convention or association of churches," "religious and apostolic association," "religious sect," "minister of the gospel," "dioceses," and "Christian Science practitioner." The great majority of these phrases have been added to the code since 1950, some at the behest of churches on constitutional grounds so as to limit monitoring and regulation by the government, and others granting exemptions and benefits not necessarily required by the First Amendment.

The sources of conflict are threefold. First, in order to limit the number of entities enjoying special treatment and to increase tax revenues, government agencies have a natural interest in seeing church terms defined as narrowly as possible. Churches, on the other hand, have an interest in expanding definitional limits. This fundamental conflict makes definitional disputes inevitable.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Second, churches have complex religious vocabularies and organizational structures predicated on transcendental visions of time and institutional identity and conditioned by centuries of historical and theological evolution. Governments, true to their nature, seek to develop vocabularies and shape structures that are uniform, simplified, readily understood and—in the modern world—not avowedly conditioned by the past. Church terminologies and hierarchies will appear illogical and therefore suspicious to the rationalizing, compartmentalized bureaucratic mind. Government definitions of "church" terms, on the other hand, will appear arbitrary and clumsy to those who are theologically and historically sensitive.

Third, various denominations hold widely different views of what "church" and similar terms mean. Baptists define "church" as a local congregation. Mormons or Roman Catholics see congregations or parishes, regional and national hierarchies, agencies, hospitals, and schools as part of one unified "church." Lutheran and other perceptions fall somewhere in between. Any bureaucratic attempt at uniform definitions of church terminology (especially any restrictive definition) naturally disturbs those religious bodies with alternative interpretations.

A major dispute involving such limits arose over successive IRS definitions of the term, "integrated auxiliary of a church." Before 1970, most religious organizations were exempted from filing financial disclosure forms with the IRS. Congress altered this arrangement in the Tax Reform Act of 1969, narrowing the exemption so it applied to only a few categories, including "churches, their integrated auxiliaries, and conventions or associations of churches." The Senate added the word "auxiliaries"—which has special meaning within the lexicon of the Church of Jesus Christ of Latter Day Saints—at the suggestion of Senator Wallace Bennett of Utah. When House-Senate conferees modified "auxiliaries" with "integrated," legislative intent grew murkier yet.

In February 1976 the IRS issued proposed regulations that defined an integrated auxiliary as an organization "whose primary purpose is to carry out the tenets, functions and principles of faith of the church with which it is affiliated" and whose operations "directly promote religious activity among the members of the church." Using this distinction, the IRS then specified that church men's and women's clubs, mission societies, and Sunday schools would be integrated auxiliaries, while church hospitals, social service agencies, retirement homes, and elementary schools would not.

In written comments and at a June 1976 public hearing, churches bitterly denounced the proposal for setting an arbitrary universal definition of religious mission and "principles of faith," for confining "religious activity" to members and thereby denying the evangelical and service work central to many religious bodies, for allowing the IRS to monitor internal church financial operations, and for distorting congressional intent by using "integrated auxiliaries" as a narrowing rather than a broadening term. For that term, though, they could not produce a commonly acceptable alternative consistent with the legislative history.

When final regulations were issued in January 1977 the IRS dropped the "primary purpose" distinction, adopting instead a somewhat more creative "secular counterpart" test. Integrated auxiliary is now defined as a tax-exempt organization which is "affiliated" with a church and whose "principle activity is exclusively religious." Under this definition an organization cannot be considered "exclusively religious" if it can also be considered "charitable" or "educational." Thus, church schools, agencies, and hospitals were again excluded (though for transparent political reasons, the secretary of the Treasury used his "discretionary authority" to exempt church-related elementary and secondary schools from the filing requirement—which diffused some opposition to the final regulations). Church protests against this arbitrary divorce of "religious" and "charitable" have been to no avail.

A second controversy developed from an April 1978 Department of Labor interpretation that church elementary and secondary schools are not exempted by federal statute from state unemployment insurance taxes. In 1976 Congress had repealed a provision of the Federal Unemployment Tax Act that allowed states to exclude the employees of private schools below the college level from unemployment insurance coverage. Churches argued that employees of church-sponsored schools were still exempt under a remaining provision that allows the exclusion of persons employed by a church or

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

convention or association of churches or by an organization operated primarily for religious purposes and run, supervised, controlled, or principally supported by a church. However, the Department of Labor ruled that Congress "clearly intended" to cover church-sponsored schools. Only "those strictly church duties performed by church employees pursuant to their religious responsibilities within the schools," the ruling continued, could "reasonably" fall within the religious exclusion's scope. Court challenges to this ruling are under way in many states.

Still another regulatory problem came about from the addition of the term "church plans" to the Internal Revenue Code by the Employee Retirement Income Security Act of 1974 (ERISA). The act exempts "church plans" from most ERISA regulation. (While such plans may make an irrevocable election to be covered by ERISA, few have done so.) Yet, in response to reported labor problems within several church-run hospitals in New York, the act also specifies by definition that while ERISA-exempt church plans could continue to cover the employees of "churches or conventions or associations of churches" indefinitely, they could not cover the employees of "agencies of a church or a convention or association of churches" after December 31, 1982. Proposed IRS regulations issued in April 1977 define "church plan" in a manner that does little to blunt the effect of the statutory language. Pension boards from twenty-five religious denominations, banded together as the "Church Alliance for the Clarification of ERISA," are supporting a definitional change that would allow them to cover church agency employees after 1982 while retaining their ERISA exemption.

The Wages of Original Sin

As should be apparent, federal recognition of an organization as a "church" confers many benefits, not the least of which is significant institutional insulation from government scrutiny. Undeniably, such status can be abused. Recent incidents have involved:

—The Rev. Guido Carcich, chief fund-raiser for the Roman Catholic Pallotine Fathers, who gathered millions of dollars for starving children through sophisticated fund-raising techniques, but used under 3 percent of those dollars for stated purposes;

—the Billy Graham Evangelistic Association, which acknowledged in 1977 with much embarrassment the existence of an unreported multi-million dollar special fund built up through regular donations;

—the Rev. Jim Jones, an ordained Christian Church (Disciples of Christ) minister, who forsook his faith, embraced revolutionary socialism, terrorized his opponents, siphoned off his congregation's wealth, and led over 900 followers to brutal death in a Guyana jungle;

—the Universal Life Church, which offers divinity degrees, ordination, and the attendant generous tax advantages to anyone making a $20 "offering."

Such incidents have increased pressures for bringing the financial transactions, fund-raising practices, and exempt status of the church community under fresh review. In that majority of states having some form of charitable solicitation disclosure law, existing exemptions for religious organizations are being reassessed. On the federal level, bills have been introduced in the last three congresses to place reporting and regulatory requirements on religious and other charitable fund-raising practices. The House Committee on Post Office and Civil Service approved such a measure in 1976. Reintroduced by Representative Charles Wilson in 1977, it was backed by several of the larger secular charities but, after receiving subcommittee approval, died in full committee in the face of strong church opposition. There are recurring rumors that the Department of the Treasury may propose legislation to govern the financial and fund-raising activities of 501(c)(3) charitable organizations, probably exempting churches but not related schools and agencies.

Religion in the Welfare State

The intrusion of regulation into the religious sphere, the tightening restraints on church advocacy and political education work, the growing (and compromising) dependency of church schools and agencies on state funds, the unseemly scramble for special church exemptions or privileges, the definitional disputes, and the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

growing unwillingness of the public and government to tolerate abuse of religious liberty—these are more than the convergence of unrelated events. They reflect the problems and tensions that arise when institutions that emerged in an earlier and more cordial environment search for a relevant existence in the modern welfare state.

In 1840, Alexis de Tocqueville noted that while organized religion was less powerful in the United States than in other nations and eras, its influence was more lasting: "It restricts itself to its own resources, but of these none can deprive it; its circle is limited, but it pervades it and holds it under undisputed control." In 1979, the situation is almost the reverse. On the one hand, many churches have vastly broadened their "circle" of religious activity, cloaking their advocacy of the whole public agenda of expanding social and economic regulation with a spiritual mantle. On the other hand, their dependency on governmental funds (with the accompanying regulation) has become such that only a shrinking number can still claim undisputed control over even their more traditional institutional circles.

In many respects, the fate of churches and their related institutions is but one facet of a broader phenomenon—the decline of the American voluntary tradition. The Western European experience since 1945 suggests that a creative and independent voluntary sector may be incompatible with the egalitarianism, planned uniformity, and heavy tax burdens of the welfare state. Social democrats in Sweden, Great Britain, and elsewhere maintain that private charity is a bourgeois instrument now fully preempted by the state. Where government assumes the responsibility for funding, operating, and regulating *all* social services, voluntary associations must wither away or be effectively coopted into the planned mechanism.

Within this context, however, there remain possible changes in church perceptions and attitudes that might diminish tension and confusion between organized religion and the state. Churches might start by clarifying their own often sloppy structural definitions and organizational ties. Following examples already set by the Billy Graham association and the Roman Catholic bishops, they could voluntarily improve their public accountability in financial and fund-raising activities.

Churches could also sort their existing exemptions and related legal benefits into what is necessary, what is desirable, and what is unnecessary. They might then offer the government some ideas for reasonable regulatory alternatives—ones that would avoid excessive state interference in church affairs. On the "integrated auxiliary" question, for instance, Charles Whalen of Fordham Law School has proposed replacing the existing rule with a new test basing the required filing of financial disclosure returns on the degree to which church agencies accept governmental funding and purport to serve the general public, rather than on the degree of their "church relatedness." While not a perfect resolution of the problem, the proposal deserves more attention from churches than it has so far received.

American churches need to rediscover their vital interest in preservation of the classic liberal order. While advocating growing federal authority over private life for reasons of social justice, many churches have often sought for themselves (or complacently relied upon) special exemptions from that same authority. It is true that some governmental actions pose unique threats to the special purpose and peculiar nature of organized religion; and these are properly opposed on religious liberty grounds. But most current exemptions do not fall in this category. Religious groups cannot morally or constitutionally rely on special protections from the regulatory powers increasingly governing other private entities; nor can they realistically expect such treatment to stand the test of time.

On the government's side, Congress might reverse its course and begin hacking through the controversy-laden thicket of church terminology that congests the Internal Revenue Code and other federal statutes. Congress could also redraft the vague lobbying and political activity restrictions of Code Section 501(c)(3). Perhaps most important, Congress might take steps to strengthen the quasi-independent economic foundation of all voluntary associations. It is increasingly clear that the exploding costs of providing quality educational, social, and health services cannot be met by such groups unless governments reduce their enormous taxation of private funds that might otherwise be contributed for such purposes. A massive gen-

(Continues on page 64)

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

An irony of electoral reform

Edwin M. Epstein

THE 1970s HAVE WITNESSED an explosion in federal regulation of the electoral process. When the Ninety-Sixth Congress deliberates the Federal Election Campaign Act Amendments of 1979, it would do well to keep in mind an important lesson of the three previous rounds in federal campaign legislation. The lesson is that campaign regulation, like regulation in other fields, often has unintended—and indeed ironic—consequences.

It is not an exaggeration to say that the Federal Election Campaign Act (FECA), enacted in 1971 and amended in 1974 and 1976, has legitimized the role of corporations and business-related groups in federal elections, greatly improving their position vis-à-vis labor and other social interests. The act has also established the political action committee (PAC), labor's long-time and essential political mechanism, as the primary vehicle for business involvement in the electoral process. The irony is that, in each of the three legislative rounds, it was organized labor, not business, that brought about the key provisions relating to PACs. A further irony is that comprehensive campaign regulation has increased the role of organized "special" interests within the federal electoral process at the expense of political parties and individual contributors—surely a far cry from what reformers intended.

Edwin M. Epstein is professor and chairman of the Political, Social, and Legal Environment Group, School of Business Administration, University of California, Berkeley.

Federal Election Regulation of Business and Labor in the 1970s

A glance at recent history will help explain how these developments came about. Union experience with PACs dates to the mid-1930s when John L. Lewis established Labor's Non-Partisan Political League. Then, in 1955, the merger of the AFL and CIO brought with it the creation of the Committee on Political Education (COPE), the model for virtually all future political action committees. From the outset, national, state, and local units of COPE have not only raised and distributed funds, but have also served as the mechanism for coherent and comprehensive union activity in the electoral process, including voter registration, political education, and get-out-the-vote drives.

Business, however, did little with PACs before 1972. Actually, until the reforms in campaign financing laws of the 1970s, there was little need for business PACs: monies from business-related sources could legally enter the electoral arena in virtually unlimited amounts, in the form of individual contributions by wealthy persons affiliated with corporations and other business organizations. Thus, for example, the Business Industry Political Action Committee (BIPAC), formed by affiliates of the National Association of Manufacturers during the early 1960s, was a pale shadow of COPE.

The Federal Election Campaign Act of 1971 is the root of the PAC growth of the seventies. That act allowed corporations and labor unions (1) to communicate on any subject (including

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

partisan politics) with stockholders and members, respectively, and their families, (2) to conduct nonpartisan registration and get-out-the-vote drives directed at these same constituencies, and (3) to spend company and union funds to establish and administer a "separate segregated fund" to be used for political purposes—that is, to set up political action committees.

The provision authorizing PACs was added to the bill on the House floor through an amendment drafted by the AFL-CIO. In this amendment, organized labor was seeking insurance against the possibility that the Supreme Court would uphold a court of appeal's ruling that the PAC organized by Pipefitters Local Union No. 562 was compulsory and union-financed rather than voluntary and member-financed, and was therefore illegal. Unions were, according to the AFL-CIO officials who helped draft the amendment authorizing PACs, taking a calculated risk. Since previous corporate electoral activity had been aimed at management-level employees rather than at shareholders and had focused primarily on fund-raising activities, few labor leaders thought companies would establish PACs. So they figured that the benefits from removing the threat to union political action committees would exceed the risks of giving business a virtual carte blanche to establish PACs. Though the new 1971 law provided the basis for the Supreme Court's reversal of the court of appeals in *Pipefitters* (1972), it nonetheless turned out to be a strategic error for labor in the longer term.

Corporate PACs played a relatively small role in the 1972 election. In addition to the fund-raising entrepreneurship of the Finance Committee to Re-Elect the President (which raised substantial sums from business sources), there was another reason. Many companies with government contracts were fearful of establishing political action committees after Common Cause, in a lawsuit against TRW Inc., questioned whether the authorization of corporate PACs was compatible with another section in the 1971 act that prohibited campaign contributions by government contractors.

Labor was also concerned about the Common Cause suit, because a number of unions were government contractors by reason of their federal manpower training and development contracts. Thus in the debate on the 1974 FECA amendments, labor led the successful campaign for a provision making it clear that corporations and labor unions with government contracts were *not* prohibited from establishing PACs. But, as in 1971, the effort backfired—in this instance because the overwhelming majority of government contractors are corporations. Thus, it has been business, not labor, that has been the major beneficiary of labor's effort.

The next chapter in our story begins with the Federal Election Commission's 1975 ruling in SUN-PAC, the most important advisory opinion in the commission's four-year history. In a 4–2 decision, the FEC held that Sun Oil Company could (1) use general treasury funds to establish, administer, and solicit contributions to SUN-PAC, its political action committee, (2) solicit contributions to SUN-PAC from both stockholders *and employees*, and (3) establish multiple PACs, each with separate contribution and expenditure limits, as long as the monies came solely from voluntary contributions. While it was the 1971 and 1974 amendments that provided the legal authority for business PACs, it was SUN-PAC that provided the imprimatur for the explosion in their size and numbers. In the six months following the FEC's decision, over 150 corporations established PACs, bringing the number in existence to nearly 300. Not surprisingly, labor groups vigorously denounced the SUN-PAC ruling and resorted once again to the Congress.

At the heart of Congress's concerns in drafting the 1976 campaign act amendments was rectification of the SUN-PAC outcome by establishing a new and politically acceptable balance between union and corporate rights in federal elections. Once again, lobbyists for the AFL-CIO and the United Auto Workers spearheaded the legislative effort. In the end, the bill, while hardly a complete labor triumph, was clearly more acceptable to labor than to business.

The nub of the compromise worked out was a provision limiting corporate PACs to soliciting contributions from stockholders and "executive or administrative personnel" and their families, while, as before, labor unions were limited to soliciting union members and their families. Twice a year, union and corporate PACs could make use of "cross-over" rights —that is, solicit the other's constituency by mail, using an independent third party as a con-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

duit. Organized labor achieved a key objective when it was permitted to use payroll deduction plans ("check-offs") to collect from its members if the company PAC used that method with its stockholders or executive/administrative personnel. Finally, a "nonproliferation" provision was included: while a corporation (or union) could set up an unlimited number of PACs, all such affiliated committees were restricted to a contribution limit of $5,000 per candidate per election. This provision was designed to eliminate the establishment of multiple PACs by corporations seeking to take advantage of SUN-PAC ruling. Labor's triumph was only partial, however, since union and union-affiliated PACs were limited in the same way. Moreover, membership organizations, trade associations, cooperatives, and corporations without capital stock were explicitly authorized to establish PACs.

In summary, while the 1976 amendments restored part of what organized labor had lost in SUN-PAC, they gave the business community far greater running room in the electoral process than theretofore. Ironically, both business and labor exert a much stronger impact upon electoral politics today than reformers had envisioned or find acceptable.

... while the 1976 amendments restored part of what organized labor had lost in SUN-PAC, they gave the business community far greater running room in the electoral process than theretofore.

Campaign 1978

Federal Election Commission statistics for 1976 and 1978 show the rapid expansion in numbers and activity by PACs in general and business-related PACs in particular. For those two years, the number of PACs rose from 1,242 to 1,938 and total spending by these committees rose from $30.1 million to $77.8 million. There were more corporate PACs than labor throughout the period but, in each campaign, labor PACs outraised and outspent their corporate counterparts. The situation was rapidly changing, however, for almost all of the increase in PAC funds was generated by nonlabor PACs—that is, corporate and "other." (See Table 1.)

In 1978 PACs contributed $35.1 million directly to congressional candidates, representing 18 percent of the $199 million these candidates received from all sources that year. Of this amount, corporate PACs donated some $9.8 million, favoring Republicans over Democrats ($6.2 million to $3.7 million) and incumbents over challengers and candidates for open seats (5.7 to 2.1 and 2.1); and labor-affiliated committees donated $10.2 million, favoring Democrats over Republicans (9.7 to 0.6) and incumbents over challengers and open seat candidates (6.1 to 2.2 and 2.0).

Simple corporate-labor comparisons, while interesting, understate significantly the extent of business's electoral role. This is so because the FEC's classification scheme puts groups that are not explicitly business or labor into four separate categories—No-Connected Organizations (for example, Business-Industry Political Action Committee), Trade/Membership /Health (for example, National Association of Realtors), Cooperatives (for example, Associated Milk Producers, Inc.), and Corporations without Stock (for example, California Almond Growers Exchange). In 1978, as column three of Table 1 shows, the four categories accounted for 836 PACs and contributions to congressional candidates of $15.0 million. In those contributions Republicans were favored over Democrats ($8.7 million to $6.3 million) and incumbents over challengers and candidates for open seats (8.1 to 3.5 and 3.4). If we assume that only half the amounts raised, spent, and contributed to congressional candidates by the noncorporate, nonlabor PACs emanate from business-related committees—a very conservative estimate, indeed!—the receipts and disbursements attributable to business rise by over $21.5 million and contributions to congressional candidates by 7.5 million. Thus the totals for corporate and business-related PAC activity are those given in the fourth column of Table 1.

Based on these estimates, business and business-related groups out-raised and out-disbursed labor groups by almost two to one in 1978 and out-contributed them by almost 70 percent. Indeed several of the largest noncorporate business-related PACs, such as those of the National Association of Realtors and the Na-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Table 1

PAC FINANCIAL DATA, CAMPAIGNS 1976 AND 1978
($ in millions)

	Committee Type			
	Labor	Corporate	Other[a]	Total business estimated[b]
Number:[c]				
1976	303	450	489	695
1978	281	821	836	1,239
Number contributing to congressional candidates:				
1976	265	390	—	—
1978	211	697	551	973
Receipts (adj.):				
1976	$18.6	$ 6.8	—	—
1978	$19.8	$17.7	$43.1	$39.3
Disbursements (adj.):				
1976	$17.5	$ 5.8	$ 6.8 (est.)	$12.6 (est.)
1978	$18.9	$15.3	$43.6	$37.1
Contributions to congressional candidates:				
1976	$ 8.2	$ 4.3	—	—
1978	$10.2	$ 9.8	$15.0	$17.3

a Composed of all PACs classified by the FEC as No-Connected, Membership/Trade Association/Health, Cooperatives, and Corporations without Capital Stock.

b Includes figures for corporate PACs and for the half of "other" PACs (column three) that is assumed to be "business related" (see text), except that the figure for 1976 disbursements ($6.8 million) is for business-related PACs only (estimated by *Fortune*).

c Includes all PACs that engaged in activity during the two-year cycle.

Sources: FEC Report on Financial Activity, 1977-78, Interim Report (May 1979), FEC Disclosure Series No. 8 (1977) and 10 (1978), and *Fortune*, March 27, 1978.

tional Automobile Dealers Association, outraised, out-spent, and out-contributed (or matched) the two biggest labor committees, AFL-CIO COPE and UAW-V-CAP. These noncorporate business-related PACs, moreover, outstripped even the largest company committees, Standard Oil of Indiana's and the International Paper Company's, by a factor of six to one.

The increase in PAC activity from 1976 to 1978 continued a trend. According to Common Cause, between 1974 and 1976 corporate and trade association groups had increased their contributions over two-and-one-half-fold ($2.5 million to $7.1 million), while labor groups had raised theirs by some 30 percent ($6.3 million to $8.2 million). It is thus no surprise that, between 1976 and 1978, corporate contributions to candidates more than doubled, while labor's contributions rose by 24 percent. Whatever measures one uses, it is apparent that business-related PACs (both of the corporate and noncorporate varieties) played a far more important role in 1978 than they had in any election theretofore.

Two caveats are necessary here. First, along with establishing PACs, corporations, unions, and other groups may advocate (in communications to their stockholders, managerial personnel, and members) the support or defeat of particular candidates, as long as they report such expenditures of $2,000 or more to the FEC. In 1976, sixty-six labor organizations reported spending slightly more than $2 million in internal communications, while only four corporations reported spending a total of $31,000. Second, the above figures do not include labor union spending for registration, get-out-the-vote, candidate logistical support, and general political education—activities that benefit labor-endorsed candidates and are considered by many political observers to be more important to a candidate's campaign than direct financial contributions. Michael J. Malbin estimates that, in 1976, organized labor at all levels spent almost two-thirds as much on these nonreportable items (and overhead) as its total reportable expenditures of $17.5 million (*National Journal*, March 19, 1977). In 1978, labor probably spent nearly $20 million for these items. While some national business groups (BIPAC, for one) and an occasional corporation have undertaken serious political education efforts, business has in general done very little in voter registration, get-out-the-vote, and non-candidate-related internal political communications. In these endeavors labor's expertise—and comparative advantage—remain most apparent.

The Business PAC Potential

The explosion in total business PAC activity from 1974 to 1978 reflects mostly the rise in the number of corporate and business-related PACs. While labor's PACs increased some 35 percent, the number of corporate PACs expanded more than sevenfold and those affiliated with "other" interests expanded more than two-and-a-half times. Impressive as the growth

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in corporate PACs has been, what is astonishing is how few corporate PACs there are, given how many there might be. Contrary to popular opinion, only 41 percent of the corporations with PACs on September 30, 1978, were among the giants of American business, as measured by inclusion in any of *Fortune* magazine's 1978 lists.

Consider the bottom line of Table 2: of *Fortune*'s top 1,000 industrials and 300 leading nonindustrials (1,300 firms in all), only 334 firms—26 percent—had a PAC as of September 1978. If we turn to the entire pool of potential corporate registrants, the figures are even more dramatic. The 823 corporate PACs active in the 1978 cycle represented only 22 percent of the 3,755 U.S. corporations with reported assets of $100 million or more (1974) and a meager 3.4 percent of the 23,834 corporations with reported assets of $10 million or more. In short, the market for potential PAC formations is virtually untapped.

Table 2

PACs OF *FORTUNE*-RANKED FIRMS, BY FIRM SIZE, SEPTEMBER 1978

Size Category (based on 1977 revenues)		Number of PACs
Fortune's Top 1,000 Industrials:		
First 250		141
1st 50	35	
2nd 50	34	
3rd 50	30	
4th 50	25	
5th 50	17	
Second 250		52
Third 250		24
Fourth 250		7
Subtotal		224
Fortune's Leading 300 Nonindustrials (50 firms in each category):		
Commercial banking		25
Life insurances		6
Diversified financials		15
Retailing		15
Transportation		26
Utilities		23
Subtotal		110
Total, *Fortune*'s 1,300 Firms		334

Source: FEC Report on Financial Activity, 1977-78, Interim Report No. 2 (September 1978).

Moreover, in monies raised and donated, the 1978 operations of corporate PACs reveal just the tip of a possible iceberg. In 1976 only nine corporate PACs raised or spent more than $100,000, and in 1978 only six raised or spent more than $200,000.

Given the trend and the potential, there is no gainsaying that company committees give every promise of continuing to increase in numbers and in the distribution of their PAC funds. Surely by 1982, there could be 1,000 corporate PACs spending a total of some $50 million (an average of $50,000 apiece) and distributing $25–30 million directly to congressional candidates (assuming the present disbursement ratios do not change). My research suggests, moreover, that at least some companies will begin to undertake new forms of electoral involvement—automatic payroll deduction plans, nonpartisan registration and get-out-the-vote drives, and internal political communications among managerial level employees and shareholders.

Similarly, business-related (but noncorporate) associations are likely to increase both the size and vigor of their PAC operations. Here, too, the pool of potential registrants is large. For example, an estimated 1,500 trade and professional associations are currently headquartered in Washington, D.C., alone.

Labor PAC Potential

On the labor side, on the other hand, the number of PACs is not likely to increase much from the high-water mark of 303 in 1976. The unions that are politically active have, in the main, been operating PACs for years. Moreover, according to FEC data, of the 303 labor committees active in the 1976 campaign, 42 raised and spent over 82 percent of labor's funds. If the 21 with receipts or expenditures of $50,000–100,000 are added in, we have nearly 90 percent of the union total. The remaining PACs represented either small unions or affiliates of large international unions (and, as such, were subject to the single contribution limit).

Labor's best opportunity for increasing its pool of voluntary political dollars lies in developing more productive fund-raising techniques. Very few unions, whether AFL-CIO affiliated or independent, have average contributions of a dollar per worker per year. If even that small amount were collected from each unionist, organized labor would raise some $19.4 million annually—or nearly $39 million

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

biennially—from its U.S. members. This would almost double the amount generated by labor for campaign 1978 ($19.8 million) and would permit unions to contribute some $20 million directly to congressional candidates. Some unions are beginning to use payroll deductions (check-offs) to increase their per-member annual yield where this method is available through either reciprocal rights or collective bargaining. Others are considering direct-mail campaigns among their members—a technique used to good advantage by conservative groups and by the National Republican Congressional Campaign Committee.

Coping with Unintended Consequences

Certainly it is premature to suggest that labor's overall electoral effectiveness vis-à-vis business has been fatally impaired. Undoubtedly, some business-related PAC money is simply old wine in new bottles—funds that business had previously channeled into the campaign-financing process through company or associational officials or, on some occasions, sub rosa. But the rapidity and effectiveness with which the business community embraced the PAC was not anticipated by organized labor's political leadership. Nor did the leadership anticipate that the growth of business PACs would erode labor's position by providing alternative sources of funding for both congressional incumbents and challengers (particularly Democrats) who in the past were heavily dependent upon union monies for their campaigns.

... the rapidity and effectiveness with which the business community embraced the PAC was not anticipated by organized labor's political leadership.

It is hardly surprising therefore that, in the last Congress, the same labor representatives who were most instrumental in shaping the PAC provisions in the earlier campaign acts urged that PAC contribution limits be reduced from $5,000 to $2,500 and that partial public financing of House general election races be instituted. Arguably, the effect of the proposed halving of PAC contributions would be more cosmetic than real, since the great bulk of both labor and business contributions is in amounts of less than $2,500, yet it is noteworthy that union PACs gave more $2,500-and-over contributions in 1976 than did business. Labor apparently is willing to forego a short-run advantage from maintaining the higher limit in exchange for the longer-run benefit of forestalling the large corporate contributions that could come once company PACs have assembled truly substantial funds.

In addition—and for very similar reasons—organized labor is strongly backing the two public financing bills currently under consideration in the Congress (H.R. 1 and S. 623). Many labor officials would like to have unions, corporations, and other interest groups wholly out of the business of making direct money contributions—through their PACs—to political candidates and party committees. They worry that direct business contributions could eventually far outstrip direct labor contributions and would prefer, therefore, to restrict business and labor involvement to those activities in which labor has the greatest comparative advantage—voter registration, political research and education, and get-out-the-vote endeavors.

A Reminder to Congress

While the role of the individual contributor has been constrained by the Federal Election Campaign Act, union and particularly business electoral *potential* has been increased. The "reforms" of the 1970s have given both business and labor a distinct advantage over those social interests that have neither the legal right to use organization funds for PAC start-up and administrative costs, nor the requisite financial or organizational resources to emulate labor or business PACs. It is important to note here that, although business and labor are usually cast in the role of electoral competitors, frequently they in fact share sufficient political interests so that cooperation rather than competition can characterize their behavior. Joint labor-business geographical concerns or industry needs, or the opposition of a common foe (a militant environmental group) can mean coalition politics in which the two most powerful coalitions themselves join together. Arguably, one of the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

greatest potential challenges to the integrity of American electoral politics could arise from excessive harmony between powerful business and powerful labor.

The future of labor and business-related PACs is, however, uncertain. If *full* public financing of congressional elections should be adopted, business and labor would presumably shift their efforts from direct contributions to in-kind contributions and independent expenditures (assuming such activities remained legal). Labor, at least in the short run, would have a clear advantage here. Even without such a change, the future electoral roles of business and labor will be determined by what PACs actually do in the years ahead. If corporate and business-related PACs should raise $50 million per election biennium and contribute half that directly to federal candidates, and if labor PACs should achieve their $40 million goal, we might, indeed, reach a point where too much campaign money originates from these sources. This would be particularly the case if business and labor contributions were largely reinforcing—supporting incumbents (though different ones to some extent), doing little for challengers, and thereby perpetuating the congressional status quo.

Undoubtedly, the most important rationale underlying public regulation of corporate and labor electoral involvement has been to ensure that the power of wealth does not run roughshod over the people's will. In 1978, business and labor PACs provided 18 percent of the $199 million raised by congressional candidates. This percentage does not, in my view, amount to excessive interference in the political process or present the kind of threat to the body politic that would justify dramatic new regulation of electoral behavior. Nor shall we reach that point unless business or labor badly overplays its hand by misuse or overuse of its political action committees. The irony of all this is that organized labor unwittingly sowed the seeds that have borne the very fruit it sought to prevent—enhanced business electoral effectiveness—through business use of labor's favorite mechanism, the political action committee. It is a case in point that regulatory measures may have unforeseen consequences—which is something to be kept in the congressional mind. ■

The Business PAC Phenomenon

Neither a mountain nor a molehill

Michael J. Malbin

CONGRESS TRIED three times in the 1970s to minimize the role of "private interests" in federal election campaigns. Three times, Congress failed. Edwin Epstein demonstrates this by showing how a series of amendments pushed by organized labor over the active opposition of the business community have worked to labor's net disadvantage. It is particularly appropriate to stress this now, as Congress tries to beat the odds favoring ironic consequences with still one more bill to "clean up" the campaign process.

Epstein's negative thesis is persuasive, but his positive thesis seems less satisfactory. He argues that business gained from labor's miscalculation. To this end, he shows that business PACs are bigger now than they used to be and probably will get even bigger in the future. His

Michael J. Malbin is a resident fellow of the American Enterprise Institute and a contributing editor to National Journal.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

evidence is indisputable, but there is a large gap between his true statements about *PAC* growth and the questionable inference that business's overall involvement in electoral politics is on the rise. To be fair, Epstein never draws this inference directly. It is drawn, however, by others to support their political positions on the need for further legislation.

The problem with the inference is that a business PAC contribution is only one of a number of ways in which people in business participate in electoral politics. Before the 1974 law individuals in business and other walks of life were allowed to contribute unlimited amounts to political campaigns whereas corporations, as Epstein notes, were required for the most part to stay out of politics *as corporate entities.* Not all corporations did stay out, of course. One of the main reasons it was considered a "reform" to let corporations form PACs was that a fairly large number of them were already doing, under the table, what they now are permitted to do openly. Executives were "encouraged" to contribute specific percentages of their salaries to political candidates. "Double envelopes" were used to collect individual contributions and deliver them to candidates in an outer envelope bearing the corporation's return address. Corporate funds were passed off illegally as individual contributions. Airplanes, photocopying, and other in-kind services were made available to candidates. Faced with all this, Congress decided in 1974 that it preferred the open participation of corporations through political action committees to the covert participation then in vogue.

It is possible, of course, that the $17.3 million listed by Epstein as business PAC contributions to congressional candidates in 1978 represents a net increase in business activity from the years before 1974, but the point would be difficult to prove. For my own part, I doubt it. Of Epstein's $17.3 million, $7.5 million came from trade associations, professional organizations, agricultural cooperatives, and the like—precisely the same organizations that, together with organized labor, dominated pre-1974 contributions by formally organized groups. The real question is whether business PACs and individuals in business together now give a greater combined total than the unreported combined total of what used to be given legally by individuals in business and illegally by corporations. That question in principle is an empirical one, but we are not likely ever to know the answer. It took Herbert Alexander months after each election to give us a picture of presidential campaign finances in the years before public reporting, and no one ever has done or could do the equivalent research on congressional races. As I said, I doubt that the combined figures have grown all that much—particularly not if they are viewed as percentages of the whole electoral dollar.

We do know one thing for certain, however. PAC contributions grew from 1976 to 1978, but *they did not grow when viewed as a percentage of the whole.* The table makes this clear. While PACs may have given 50 percent more to congressional candidates in 1978 than in 1976, so did everyone else. Candidates were raising money in 1978 from the same kinds of places in roughly the same proportions as they did two years before. As in 1976, more than half of the money raised for House candidates who made it to the general election and more than two-thirds of the money for Senate general election candidates came from individuals, with small contributors leading the way.

FUND SOURCES, HOUSE AND SENATE GENERAL ELECTION CANDIDATES, 1976 AND 1978

	House		Senate	
	1976	1978 (est.)	1976	1978 (est.)
Amount raised (millions)	$65.7	$92.8	$39.1	$63.8
Percent from individual contributions				
$0-100	36	34	28	33
$101-499	12	10	13	11
Over $500	11	13	27	25
Percent from nonparty PAC	22	26	15	14
Percent from parties	8	7	4	7
Percent from candidate gift or loan to self	10	8	12	8
Percent from other loans	1	2	0	3

Source: FEC press releases. Final figures for 1978 were not available at the time this went to press. Percentages after October 23 are estimated from a sampling of individual FEC filings.

These figures confirm Epstein's conclusion that we are far from the point where we ought to be worried about business or other PACs

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

playing a dominant role in financing politics. I would go further than this. The experience of 1978 suggests that as fast as the funds from business PACs have poured in, fund-raisers have been able to find other ways to raise money and thus keep the PACs proportionately in their place.

. . . as fast as the funds from business PACs have poured in, fund-raisers have been able to find other ways to raise money and thus keep the PACs proportionately in their place.

But suppose PACs do grow proportionately as well as absolutely. What should Congress's reaction be? In part, our answer depends on what we see as the problem. The evidence from 1978 seems to suggest, contrary to Epstein, that corporate PACs have gone beyond simply supporting incumbents. Risk-taking on behalf of nationally attractive challengers or open-seat candidates seems much more common among the newer corporate PACs than among the older (pre-1974) PACs sponsored by trade associations. In fact, research I am now doing seems to suggest that the larger corporations, like the umbrella labor organizations, are behaving as combined general interest/special interest groups, while the real "special interest" groups —the ones that give money to incumbents for the sake of narrow economic interests—are the single-product corporations, trade associations, and single industry labor unions. As PAC contributions have grown, the proportionate importance of these single-minded economic groups has gone down, not up.

Even if PAC growth did represent a problem, what could Congress do about it? Cutting down the maximum amount a PAC can contribute to a candidate would do little to achieve what labor seems to want, although—as Epstein notes—labor pushed for precisely this in 1978. All corporate PACs gave almost as much as all labor PACs in 1978, even though the average corporate PAC contribution per congressional candidate was less than $500. If the number of corporate PACs continues to grow, labor will need large gifts to stay in the picture at all. In other words, if labor had achieved its goal in Congress in 1978, it would have repeated its performance of 1971, 1974, and 1976. It would have put through yet another amendment over business opposition that would have ended up hurting labor more than business.

The one thing that might help labor significantly, as Epstein notes, would be full (not partial) public financing of congressional elections. The reason for this can be gleaned from the 1976 general election campaign for the presidency. In that election, labor was able to spend approximately $11 million on internal communications with its members, on voter registration, and on getting out the vote. Ostensibly nonpartisan, these latter activities (which go unreported under the law) were carefully coordinated with the Carter-Mondale campaign and equalled almost half what the government gave each candidate to spend for his campaign (see my article in *National Journal*, March 19, 1977). In the short term, full public financing was a big help to organized labor. In the long term, it would equally help any group with a similarly sophisticated political organization.

In other words, full public financing might well reduce the role of business in politics but it would scarcely mean an end to special interest politics. While some interests would be hurt, others would certainly be helped. Virtually everything once again would be unreported. Some groups may well prefer this state of affairs and push full public financing for that reason. If they do, we should at least recognize what they are doing, and not let them pass off their proposals as a way to "purify" politics or as a way to counter a supposed proportional growth in business activity that no one can show has occurred.

THE MOST SIGNIFICANT impact of the 1970 campaign finance laws has not, in my estimation, been on the power of economic interests. This has stayed relatively constant. The deepest impact has been the law's tendency to reinforce individualistic anti-party politics, while enhancing the importance of those ideological and issue groups whose fund-raising techniques favor a politics of polarization. If Congress wants to address the real issues of campaign reform, it would do well to focus on the connections between campaigns and the other structural elements of our politics, instead of blithely assuming, as it has, that money is the root of all evil. ■

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

You must form your own opinions...

but, first take advantage of knowing what the public policy leaders are saying. Enroll in the AEI Associates Program.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

THE AEI ASSOCIATES PROGRAM GIVES YOU THE ADVANTAGE

To compete in this world, an individual *must* be kept informed, not only of changing governmental policies, but also of shifting public opinion that ultimately influences those policies.

In a continuing effort to help make public policy the policy of the public, the American Enterprise Institute for Public Policy Research has established the AEI Associates Program.

CHECK THE ADVANTAGES OF SUBSCRIBING

☑ **Public Opinion**

Each Associate receives a one-year subscription to **PUBLIC OPINION**, the magazine everyone is quoting. As you can see, it is unique in concept, combining articles that explore the reasoning behind the public's opinion with a special 20-page roundup of current opinion data from major polling organizations.

It is co-edited by two noted observers of the American scene, Seymour Martin Lipset and Ben J. Wattenberg. Together, they bring an unusual blend of sensitivity toward politics and society.

☑ ☑ **Two more subscriptions of your choice**

Regulation

A popular bimonthly magazine that keeps an eye on government regulation and how it will affect your personal and business lives. The articles cover issues from no-fault auto insurance to the questions regarding children's advertising to estimating regulatory costs.

Only 18 months old, **REGULATION** has already been called "must reading for persons interested in regulatory matters" by the **Washington Post.**

the economist

An essential monthly report that clarifies current economic issues in an objective manner. It is edited by AEI Senior Fellow Herbert Stein, former Chairman of the Council of Economic Advisers.

Past issues included: "Will the Real Energy Policy Please Stand Up", "The Dream of Balancing the Budget" and "International Economics is Domestic Economics."

AEI Foreign Policy and Defense Review

A new AEI periodical, combining the analysis of defense issues featured in the **AEI DEFENSE REVIEW** with an additional focus on American foreign policy. Ten issues of the journal will be published annually. The first issue, scheduled to be published early in 1979, will focus on the continent of Africa and our future options toward these nations. A second issue will deal with United States defense options for Iran during the severe internal crisis now underway in this important nation.

☑ In addition to **PUBLIC OPINION** and the two periodicals chosen, each AEI Associate receives, compliments of the American Enterprise Institute: **THE AEI BROCHURE** — outlining the full range of AEI's programs; **THE CATALOG OF AEI PUBLICATIONS** — with periodic updates; **MEMORANDUM** — the bimonthly 12-page AEI newsletter that provides a synopsis of new AEI publications, studies and activities; and . . . a 30% DISCOUNT on any of the 100 AEI publications produced annually and more than 500 publications already in print.

☑ START THE ADVANTAGE TODAY...

To enroll in the AEI Associates Program, or to give the year-long advantage to a friend or relative, just complete the business reply card in the back of this magazine or send $30 to AEI ASSOCIATES PROGRAM, American Enterprise Institute, 1150 Seventeenth Street, N.W., Washington, D.C. 20036. Be sure to print your name and address clearly and note which two of the three AEI periodicals you would like to receive in addition to **PUBLIC OPINION.**

the associates program

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

A Case of Runaway Regulation

PREMERGER NOTIFICATION

Hugh Latimer

In September of last year, 100 pages of three-columned, small-print rules and regulations went into effect, subjecting hundreds of business transactions a year to new federal requirements. These were the final rules implementing Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which relates to "premerger notification" and the necessity for reporting certain mergers and acquisitions to the federal antitrust enforcement agencies. The 100,000 words produced by the regulation writers at the Federal Trade Commission (FTC) with the "concurrence" of the Department of Justice do not, as the number might indicate, inaugurate a new body of rules affecting the way business must be conducted, nor do they subject mergers to more rigorous antitrust standards. Rather, they deal with the procedural question whether an acquisition must be reported to the antitrust enforcement agencies, with the merging parties then required to wait thirty days (fifteen days for cash tender offers) before the transaction can be completed. Seldom have regulation writers created so much paperwork out of so little substance. Indeed, the FTC seems to take pride in acknowledging that it has transformed a simple notification program into a "new legal specialty, comparable to securities or tax law" (or so the director of the FTC's Bureau of Competition said in January 1977).

The new rules come at a time when the Carter administration is committed to "chopping down the thicket" of federal red tape and "gobbledygook." President Carter is pledged to a "continuing effort to cut down on unwarranted and unnecessary Government regulation and intrusion into the private free enterprise business sector." He has praised the Labor Department for reducing "nitpicking regulations" at the Occupational Safety and Health Administration, and commended the Defense Department for shortening the regulations on the purchase of towels from thirty pages to a paragraph. But it is doubtful he will be praising the antitrust agencies on this account.

Before the passage of Hart-Scott-Rodino, the FTC's merger notification program consisted of a two-page notice describing the program and a four-page form for sending in the required information in cases where the merger resulted in combined sales or assets for the merged company in excess of $250 million. Except for the mandatory waiting period, the new statutory provisions, while somewhat more detailed, continue essentially the same system, with the reporting requirements applying to a merger or acquisition in which one of the parties to the transaction has sales or assets of $100 million or more and the other has sales or assets of $10 million or more. By way of implementing regulations to carry out the expressed intent of Congress—to give the antitrust agencies a "fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated," thereby providing them with a "meaningful chance to win a premerger injunction"—all that was needed was a few para-

Hugh Latimer is a partner with the Washington, D.C., firm of Bergson, Borkland, Margolis & Adler.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

graphs describing the new law, defining its more important terms, and prescribing a simple form on which to supply the required data.

Instead, the premerger regulation writers have conjured up a complex world of "ultimate parent entities," acquisitions within acquisitions ("secondary acquisitions"), and four separate "notification thresholds" that can be crossed and recrossed by buying and selling various amounts of stock and assets, and that sometimes require the filing of additional premerger notification forms but sometimes not. On top of this, there is a lengthy form requiring remarkably complicated statistical calculations, including such things as 1972 sales figures transposed forward as if the reporting company manufactured and sold the same products in 1972 as it does today and, conversely, current sales figures transposed backward as if the company manufactured and sold the same products today that it did in 1972.

The inappropriateness of these rules is highlighted by the President's remarks of May 1978 to the Los Angeles County Bar Association in which he referred to the "over-lawyered" 10 percent of the population that requires the services of 90 percent of the lawyers. The premerger rules alone may render this estimate on the conservative side. In the same speech, the President put the case very well for preventing this sort of thing: "In trying to solve society's problems, our regulators have proposed unnecessarily detailed specifications and written regulations in the kind of gobbledygook that could employ a generation of law school graduates just to interpret them."

If the President has his way, the coming generation of "premerger notification" law graduates will be the last of its kind. But the gobbledygook writers will be going out in a blaze of glory, and it seems fitting to give some recognition to their final achievement. Set forth for all to see in these 100,000 words is the entire panoply of ploys, snares, and stratagems used by regulation writers for generations to consolidate and expand their regulated domain. Ambiguity, indirection, and confusion are important elements. But the indispensable requirement, however it be achieved, is to build in a need for further interpretation and "clarification" of the muddle that has gone before so that new generations of regulation writers, like lawyers, can succeed themselves, ever expanding the program as they come and go. The premerger regulation writers have improved some of the old techniques and invented a number of new and imaginative ones, and their effort should be recognized as a classic of its kind.

Set forth for all to see in these 100,000 words is the entire panoply of ploys, snares, and stratagems used by regulation writers for generations to consolidate and expand their regulated domain.

Open Ends and Loopholes

Before turning in admiration to the regulations, we must pose a preliminary question. How is it that the premerger rules are so very long and detailed?

Congress must take part—perhaps even a large part—of the blame. Since the mid-1950s, the antitrust agencies had sought not only a premerger notification procedure, but also an automatic stay provision enabling the government to prevent consummation of transactions merely by certifying to a federal district court that the public interest required delay of consummation until the actual legality of the merger had been determined. This automatic premerger injunction provision was necessary to overcome the "wholly inadequate remedy" of divestiture that always was "long-delayed" after the government prevailed on the merits of the case and almost invariably "failed to restore the competitive conditions existing before the merger"—to quote from Senate Report 94-803 (I, May 6, 1976). Thus, the provision was contained in the premerger notification bill that Senators Hart and Scott introduced into the Senate in March 1975, and its enactment was urged by the Antitrust Division of the Department of Justice as "crucial to an effective enforcement program."

Unfortunately for those who favored the bill, the Ford administration (as Deputy Attorney General Harold Tyler advised the Senate Judiciary Committee in February 1976) opposed the premerger injunction provision. That fact, together with some serious filibustering by Senators Allen, Hruska, and others, led to the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

final compromise in Hart-Scott-Rodino by which the government was merely given the option of an early federal court hearing on a preliminary injunction with no automatic stay provision of any kind.

Deprived by Congress of its primary raison d'être, the premerger legislation was reduced to a notification device, supposedly giving the antitrust agencies "a fair and reasonable opportunity" to investigate "large mergers" of questionable legality before they were consummated. Even this modest congressional objective was based upon dubious statistical premises. Without citing any source for its numbers, the Senate Report noted that the premerger legislation would cover less than 100 transactions a year out of the "approximately 3,000 mergers that have occurred annually in the course of the past several years." A half year's reporting under the premerger regulations has demonstrated that these figures were far too low. From September 5, 1978, through the third week of March 1979, by the FTC's own count, the antitrust agencies received filings on 560 transactions (*Legal Times of Washington*, April 2, 1979). If this pace continues, the FTC and the Antitrust Division will be receiving data for more than ten times the number of transactions forecast by Congress—and very few of these transactions will involve "large mergers of questionable legality." Before passage of Hart-Scott-Rodino, Congress had fair warning that if the FTC had to investigate all mergers of more than $100 million "the fruits of our efforts might not be worth the cost"—this from no less an authority than FTC Chairman Lewis Engman. Congress paid no attention, and as Engman predicted, the antitrust agencies are bearing the costs of processing an avalanche of largely meaningless paper. Far larger costs are being borne by the firms required to provide complex data to the antitrust agencies—usually for relatively small mergers and acquisitions having little or no antitrust significance.

To make matters worse, Congress not only presented a broad and ambiguous statute to the FTC's regulation writers, but also allowed them freedom both to define the terms used and to prescribe such other rules as may be "necessary and appropriate to carry out the purposes" of the legislation. And, as if this were not sufficiently open-ended, Congress also gave them the opportunity to obtain from reporting parties "such documentary material and information as is necessary and appropriate" to determine whether an acquisition violates the antitrust laws. The potential for expansive regulation writing is self-evident.

While Congress can and should be held accountable for enacting a vague and loopholed statute, with an excessive delegation of authority, the regulation writers must take equal responsibility for the length and complexity of the premerger rules. It is an unalterable phenomenon of bureaucratic behavior that any authority delegated to regulation writers will be exercised to the fullest.[1] In transforming two pages and 2,000 words of the premerger statute into 100 pages and 100,000 words of rules and regulations, the premerger regulation writers were following what can be termed a "Regulation Writer's Law," not unlike Parkinson's, that implementing regulations tend to expand so as to explain, interpret, and establish procedures for complying with every possible meaning of every word of the governing statute. On top of this, of course, a good regulation writer can find ways to go beyond any possible meaning of the statutory words.

Premerger Notification Ploys, Snares, and Stratagems

The devices used by the premerger notification writers are so numerous that anything more than a brief attempt at cataloging them by type, with an occasional example or two, would produce an exegesis nearly as long as the regulations themselves. They range from the traditional word games—expansion by over-broad

[1] In providing that the FTC obtain the "concurrence of the Antitrust Division in implementing the premerger regulations, Congress may have hoped to produce some restraint and balance in the final rules. But this, too, proved to be a miscalculation. According to former Deputy Assistant Attorney General Joe Sims, the FTC viewed the premerger notification statute as a device for obtaining as much information as possible from as many reporting firms as could be included. In contrast, according to Sims, the Antitrust Division pressed for more exemptions (particularly so as to eliminate many of the smaller transactions) and advocated a shorter initial notification form, with more detailed information and documents only being required if the acquisition appeared to present problems under the antitrust laws. With a few exceptions, such as some limitations on foreign transactions advocated by the Antitrust Division, the FTC's viewpoint largely prevailed.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

definition of terms and by finding ambiguity or double meaning where there is none—to some highly innovative techniques for confusing what appears to be clear and for obtaining data and documents Congress specifically said may not be obtained.

Expansion by Definition and Self-Created Double Meaning. A time-tested technique for regulatory expansion is to define the terms of the statute broadly enough to cover everything the regulators deem reasonable and permissible. An obvious example in the premerger notification rules is the inclusion of new joint ventures. As was pointed out in a number of comments that the FTC received on the proposed rules, no mention of joint ventures is made in either the statute or its legislative history, an omission that contrasts with the explicit references to joint ventures in another section of Hart-Scott-Rodino. It was even pointed out that the premerger statute is in the present tense and assets or securities cannot be acquired in the present from a "person" who will only exist in the future. Not deterred in the slightest by such rudimentary logic, the regulation writers merely responded that Section 7A(d)(1) gave them the power to define the terms of the act and that is all they had done. (For these and their other comments and responses, see *Federal Register*, July 31, 1978.)

A somewhat more subtle technique was used to overcome the fact that several statutory tests must be met before a merger or acquisition is covered, which obviously would reduce the regulator's domain. Specifically Section 7A(a)(2) states that the "person" from whom securities or assets are being acquired must have total sales or assets of $10 million or more, while Section 7A(a)(3) states that the securities or assets purchased must amount to 15 percent or more of the "acquired person" before notice need be filed. The regulation writers neatly minimized the effect of this limitation by finding that "the Act itself uses the term 'person' in at least two different senses," although this double meaning has not been apparent to anyone else. The device of attributing ambiguity or double meaning to a word enabled them to maximize coverage by defining "person" as the largest possible entity (the "entire corporate structure") when measuring the size of the acquired person, and as a smaller entity (for example, the subsidiary corporation that issued the stock to be acquired) when measuring whether 15 percent or more of the acquired "person" was purchased. As might be expected, a number of commentators criticized the use of different definitions of the same term, particularly when these definitions are being applied within the same subsection of the statute. The regulation writers disposed of these objections by noting that "demands for consistency were not constructive to the extent that they fail to suggest a way to apply the 15 percent test of 7A(a)(3)(A) when shares of one corporation of a multicorporate person are to be acquired." In other words, to insist that the same meaning be given to the same word in the same subsection of the statute is not "constructive" if it does not permit the regulation writers to extend their dominion.

There is a certain Orwellian quality to all this. In *Nineteen Eighty-Four*, "double-think" is to hold two contradictory beliefs in one's mind simultaneously and accept both of them, and it is not surprising perhaps that a few years short of 1984 a word can be given different meanings simultaneously so that an "acquired person" is the entire corporation or a subsidiary of the same corporation, depending on one's needs. Both for Orwell and for the regulation writers the key to power is to be able to define your own terms as you go along.

Finding Legislative Intent, Both as "Manifest" and through a Negative Pregnant. Another useful method for expanding any field of regulation is to discover a "legislative intent" for something that is desired but cannot be justified any other way. The regulation writers effectively employed this device in subjecting acquisitions made long before the passage of Hart-Scott-Rodino to the requirements of the act—which would be questionable ex post facto law if enacted by Congress. By way of an example, the premerger regulators pointed hypothetically to corporation A's seeking to acquire $1 million of the stock of corporation X after the regulations have gone into effect, but already holding $19 million of the same company's stock, purchased at a much earlier date. Since Section 7A(a)(3) of the statute specifies that coverage depends on the acquiring company's holding $15 million of stock "as a result of" the acquisition, it would seem to be elemen-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tary that the $1 million stock purchase need not be reported. Not so, according to the regulation writers, and they overcome the hurdle by "deeming" the earlier $19 million purchase to be part of the later $1 million purchase.

Outlandish? Clearly it is, but the premerger regulators had no trouble finding that the Hart-Scott-Rodino Act "manifests an intention that the agencies should be informed of large securities holdings whenever an acquisition takes place, and the rule is faithful to that intention." Exactly where such ex post facto congressional intent manifests itself they do not say, but good regulation writers, while famous for their verbosity, can also be taciturn when the occasion demands.

For an example of another "legislative intent" device—what may be called the negative pregnant—we turn again to the matter of joint ventures. As noted, the regulation writers had some difficulty in defining joint ventures into the statute since such transactions are nowhere referred to in the statute's premerger section or in the legislative debates or reports. They were able to turn this omission to their advantage by asserting that "nothing in the act's legislative history indicates that Congress did not intend for the act to reach acquisitions of voting securities in connection with the formation of new corporations," including joint ventures. Of course, the same may be said for a lot of other things Congress did not mention, and it might be wondered why this simple ploy is not used more often to expand regulatory coverage. The answer is that power grabs based on a legislative negative pregnant or on a finding of "manifest" legislative intent cannot be used too often without giving the game away. The premerger notification writers used them only when there was nothing else available.

Creating Confusion by Specifying Clear Lines for Noncoverage and Then Muddying Them Up. As we have said, one method by which regulation writers expand their domain is to be as obscure and complex as possible so that the regulators and their expanding staffs will be called upon repeatedly to clarify the confusion they themselves have wrought. The premerger notification writers are masters at this. For pure subtlety and indirection in creating confusion and thereby expanding jurisdiction, nothing quite equals their performance in drafting Rules 802.20 and 801.10.

First, in what appears to be a most magnanimous gesture of jurisdictional forbearance, they eliminated from coverage all asset acquisitions in which the acquiring corporation does not purchase assets valued at more than $10 million. As they were careful to point out, this limitation, as embodied in Rule 802.20, eliminated the "reporting and waiting period requirements with respect to certain relatively small acquisitions that are clearly reportable under the act." Ordinarily, good regulation writers do not give up any part of their jurisdiction quite so easily without a quid pro quo, and careful examination reveals that while they gave away a little with one hand, they took back a great deal more with the other.

The taking back came in Rule 801.10, where their stratagem revolved around the method by which the acquired assets must be "valued." It is not the acquisition price of the assets alone that determines the value, but rather the acquisition price or the "fair market value" of the assets, whichever is higher—with the acquisition reportable if either is greater than $10 million. As an added touch, this fair market value determination is required to be made by the acquiring company's board of directors or by someone directly accountable to the board. With this fair market value provision, the regulation writers quietly imposed a requirement that there be a fair market value determination for each asset acquisition made by a $100 million corporation, no matter how small the acquisition price.

By stealth and indirection, the regulators have extended their domain to include transactions completely outside the statute. This is expansive regulation writing at its best.

So smoothly and inconspicuously was this done that we hardly notice the disappearance of the supposedly clear-cut $10 million exemption for asset acquisitions. Similarly, the 15 percent limitation in Section 7A(a)(3) of the statute has been left far behind. Now, each time an asset acquisition of whatever size or percentage is considered by a large corporation, the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

company's top executives must become involved with premerger notification. Notice again that the fair market value determination must be made *whether or not* the acquisition is covered by the premerger statute or the regulations. By stealth and indirection, the regulators have extended their domain to include transactions completely outside the statute. This is expansive regulation writing at its best.

Expansion by Intimidation. One not-so-subtle device used by the premerger notification writers is pure and simple intimidation. Characteristically, they do not bother to make threats with the civil penalty provision of the statute (which is common to many federal statutes and rarely used). The statutory scheme provides them with a much more formidable weapon, and they make good use of it. Bluntly put, it is: "If you do not comply with our regulations and give us what we want, you will have a lawsuit and not an acquisition." To make the threat stronger, the lawsuit would concern not the legality of the acquisition, but only whether there had been compliance with the statutory requirements of notification, as interpreted (and expanded upon) by the regulation writers.

The premerger regulators found their opening for this device in what appears to be a routine provision of the statute, one specifying that the waiting period begins when the "completed" notification forms are received, or (to the extent that the forms are not completed) on the reception of "a statement of the reasons for . . . noncompliance." Aware of this potential loophole and anxious to forestall any possibility that the antitrust agencies might be able to delay and abort acquisitions by insisting on very technical "complete" compliance with the requirements before the waiting period started to run, Congress specifically required only "substantial compliance," and not "absolute and complete compliance." Moreover, alert to the ways of regulation writers, Congressman Rodino placed on the record a carefully prepared statement of legislative intent in order to make it clear that the regulators would have very little room to maneuver in order to delay the running of the waiting period. "A broad and liberal interpretation of the doctrine of 'substantial compliance' should protect the rights of the Government as well as the parties to the proposed merger." Congressman Rodino then went on to remind the regulation writers:

> It was, after all, the prospect of protracted delays of many months—which might effectively "kill" most mergers—which led to the deletion, by the Senate and the House Monopolies Subcommittee, of the "automatic stay" provisions originally contained in both bills. To interpret the requirement of substantial compliance so as to reverse this clear legislative determination clearly constitutes a misinterpretation of this bill [*Congressional Record*, September 16, 1976].

But the premerger notification writers wasted little time in setting about to misinterpret this "clear legislative determination" in as many ways as possible. Instead of adopting a "broad and liberal interpretation" of the "substantial compliance" phrase, they have specified that anything "less than a complete response potentially is not substantial compliance," and that any failure "to supply a complete response will be construed narrowly." Instead of following Chairman Rodino's admonition that a government request for data "that could not be compiled or reduced to writing in a relatively short period of time . . . would not constitute a failure to substantially comply," the regulation writers look unkindly upon any objection based on the burdensomeness of the demands for data: "That it will be costly or burdensome to obtain requested information will not necessarily excuse a failure to comply substantially. . . ."

While these may be rhetorical threats and nothing more, they reveal an unwillingness on the part of the regulation writers to adhere even to the few restrictions placed upon them by Congress. At this point, would anyone have the temerity to decline to compile an obviously burdensome and time-consuming request for data, and then claim that there had been substantial compliance? Clearly, since the threats might become real at any time, the answer is no.

Even more boldly, the regulation writers disregarded the congressional directive to keep their hands off materials protected by what Congressman Rodino called a "legitimate privilege." Both the House Report accompanying Hart-Scott-Rodino and Rodino himself stated *for the record* that withholding privileged material would not constitute failure "to substan-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tially comply" with premerger notification, nor could it serve as an excuse for any claim that the waiting period had not begun.

The premerger notification writers paid no attention. Singling out the most "legitimate" privilege of all, the attorney-client privilege, they announced that they "declined to follow" any suggestion that "documents protected by the attorney-client or other privileges should be exempt from disclosure. . . ." When "allegedly privileged" documents are withheld, they went on to state, it will be decided on a "case-by-case basis" whether "a reporting person has substantially complied with the act and rules." It would be surprising, and indeed shocking, for Congress itself to attempt to repeal such a well-recognized privilege and, of course, it did not do so. The premerger regulation writers were far more adventurous. Is it to be supposed that they thought such a clearly prohibited expansion of their power would go unchallenged? Apparently so and, as we have observed, the premerger statutory scheme provides a potent means for intimidation. When an executive is faced with the choice of fighting a lawsuit to preserve the attorney-client privilege or of completing a potentially profitable acquisition upon which much time and effort has been spent, it is a good bet that he will choose the latter.

An *in terrorem* effect may be present even if the threat to force disclosure of privileged documents is never exercised. An acquisition-minded company could well be deterred from seeking a comprehensive antitrust analysis from counsel for fear the analysis might have to be given to the regulators—or the merger delayed because the analysis was withheld. Ironically, overreaching by the regulation writers could thus increase rather than lessen the number of mergers and acquisitions of questionable legality, since merging companies following this seemingly prudent course may not receive, let alone document, adequate legal advice before completing their transactions.

How to Keep the Regulation Writers at Bay

So far, the premerger regulation writers have ignored the President, gone even beyond the broad authority delegated to them by Congress, and would seem to have little fear of challenge from those "reporting persons" whom they are regulating. An obvious inquiry at this point is how to insert some semblance of fairness and reason into this runaway regulation. One simple remedial measure would be to raise the dollar amount on reportable transactions to a more realistic level. For example, a return to the FTC's earlier merger notification figure of $250 million in sales or assets for the combined company (with a $50 million minimum for each party to the transaction) would go far to eliminate the need for reporting inconsequential transactions. Congress can and should take the lead in insisting upon this modification, and the Antitrust Division might be able to precipitate congressional action by withholding its concurrence from the next annual report the FTC must submit to Congress. (Submission of a separate Antitrust Division report calling for a sharp decrease in coverage would be even better.)

Such a step would be beneficial, but the 100,000-word muddle of complex and confusing regulations would remain. This raises the more fundamental question whether there is perhaps some prospect of curtailing regulation writers in general and the premerger notification writers in particular? It seems apparent that the only realistic hope for chopping down the premerger regulatory thicket is through decisive action by the executive branch. The administration, through the recently created Regulatory Council (and, if enacted, through the Regulation Reform Act of 1979), must carry forward its commitment to abolish unwarranted government regulations—and the premerger notification rules are an inviting first candidate. Another helpful step would be to impose length limitations on all interpretative regulations—for example (though this may be Utopian), no more words than the underlying statute itself. As a goal, this seems preferable to the fifty words of explanation for every word of the premerger statute achieved by the premerger regulation writers. Finally, the administration or Congress (or both) should adopt a "sunset" provision requiring that regulations terminate after a specified period (say, three years) and that, if another round of regulations is necessary, they must be equally concise and should be written by a new group of regulators.

If this kind of chopping down of unnecessary regulations ever got under way, there is no telling how many regulation writers (and lawyers) might have to look for other lines of work. ■

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ANTIDUMPING DUTIES FOR JAPANESE TVs

Or the social costs of everyone's locating himself in wonderland

Warren F. Schwartz

THE DEPARTMENT of the Treasury recently decided there had to be a simpler way of determining antidumping duties on television sets imported from Japan. Instead of trying to calculate the value of the set in the foreign market by independently investigating sales in that market, the Treasury will take the value established by the Japanese government for purposes of its own commodity tax. This procedure could lead to the imposition of more than $400 million in antidumping duties. Understandably, then, it has provoked bitter controversy, both as to the accuracy of the commodity tax valuation for fixing the relevant value under U.S. law and as to the fairness of applying the new method retroactively.

If there were good reasons for antidumping laws, the controversy would be an opportunity to address important issues involving the imprecision that must be tolerated in order to minimize the costs of administering the law and the limitations on change derived from the importance of being able to rely on stated policy. The need to determine foreign and domestic prices for an enormous number of products, to choose "comparable" products when the products offered in the two markets are not identical, to adjust the values to reflect differences between the "comparable" products, and to take into account differences in the distribution methods prevailing in the two countries—all of this constitutes a formidable challenge to the ingenuity of the persons entrusted with implementing the law. If, however, the antidumping laws are unjustified, as I believe they are, then the controversy is either a terrible social tragedy or (on alternate days) an uproarious social comedy in which those who stand to gain or lose from different interpretations and modes of enforcement commit enormous resources to a game from which society loses.

Warren F. Schwartz, Doherty professor of law, University of Virginia Law School, is visiting professor of law, Georgetown University Law Center.

The Antidumping Laws

The antidumping laws authorize a duty on imported goods equal to the difference between a specified price (usually the selling price in the country of origin) and the lower price at which the goods are sold in the United States. The question why such a duty should be imposed and consumers denied an opportunity to purchase goods at prices freely offered by foreign suppliers has not been addressed by the Congress for a long, long time. I believe, moreover, that it is a question with no good answer.

The law, originally enacted in 1921, appears to have been passed in response to perceived evils that would now be regarded by many scholars as nonexistent (or at least greatly exaggerated). Its principal rationale was that by offering their goods in the U.S. market at lower prices, foreign firms are engaging in "predatory" conduct—that is, conduct designed to destroy competitors and thus eventually to create monopoly profits. Recent scholarship has demonstrated, however, that the circumstances in which predatory pricing can be expected to be effectively pursued are extremely limited. Moreover, it is clear that the antidumping laws,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

which require only (1) the existence of different prices and (2) "injury" to the domestic industry, extend well beyond cases of predatory pricing, if indeed there are such cases. It is also clear that the possibility of the Japanese television industry's bringing the U.S. television industry (which includes such firms as RCA and General Electric) to its knees by predatory pricing is extremely remote. Moreover, import penetration has been far too minor to pose a significant threat to the viability of the domestic TV industry. In any event, if I am wrong and the Japanese do harbor such an intention and succeed in bringing it off, their monopoly profits would no doubt be reduced by the costs of defense against public and private antitrust proceedings and by fines and damage awards. After all, predatory pricing also violates the antitrust laws. And it would, of course, be anticipated that the prospect of antitrust liability would deter the effort to secure a monopoly by engaging in predatory pricing, if such an adventure would otherwise have been launched.

... the predatory pricing rationale fails to justify both the antidumping laws in general and the proceeding against the Japanese manufacturers of television sets in particular.

In sum, then, the predatory pricing rationale fails to justify both the antidumping laws in general and the proceeding against the Japanese manufacturers of television sets in particular. Other efficiency-oriented rationales—such as the argument that foreign competition characterized by different prices in the home and export market is particularly difficult for domestic firms to understand (so that they make an inordinate number of "mistakes" in responding appropriately)—are, in my opinion, equally baseless. Departures from efficiency have not been proved, and antidumping duties would be inappropriate corrective measures even if such departures were shown to exist, because no systematic relationship has been established between the magnitude of the price differentials and the frequency and seriousness of the "mistakes" made by domestic competitors.

What has somehow emerged is a vague and emotionally charged idea that there is some real world phenomenon called "dumping" that is inherently unfair to domestic producers. But no satisfactory explanation is given as to why the existence of different prices in the two markets (which can be explained on several grounds unrelated to the objective of securing a monopoly position) should necessarily be equated with "unfairness." I do not know the extent to which domestic interests actually believe that the practice is "unfair" and the extent to which the notion is employed cynically to secure protection from foreign competition, but there seems to be a remarkable amount of genuine conviction. I should also add, in justice to those who favor antidumping laws, that laws of this kind are widespread through the world.

Antidumping laws are not the only laws protecting American interests from foreign competition. There are tariffs and quantitative restrictions on imports. There is also the general grant of authority by which the President, upon recommendation of the International Trade Commission (ITC), may invoke a variety of means to restrict imports or assist domestic interests "injured" by foreign competition. This authority is available no matter what kind of pricing is employed by the foreign firms (which means that relief is available whether or not dumping has occurred), and it has in fact been used in favor of the U.S. television industry. In late 1977, following the ITC's finding that the U.S. industry had been injured by imports, the U.S. and Japanese governments negotiated an "orderly marketing agreement" limiting the number of Japanese television sets that can be imported into the United States and contemplating that the importation of sets from other countries will also be restricted.

The so-called import relief statute under which this action was taken was greatly liberalized when it was amended in 1975. Before 1975 it was necessary that the import-induced "injury" to U.S. manufacturers be linked to concessions granted by the United States in multilateral trade negotiations. With the removal of this requirement, there is now substantial overlap between the relief available under the general "import relief" statute and the relief available under the antidumping laws. Although there is no explicit requirement that this overlap be taken into account in administering the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

antidumping laws, it is conceivable that it is influential in shaping the Treasury conception of how great the need is for vigorous enforcement.

The Administrative Impasse and the Proposed Japanese Commodity Tax Solution

In order for goods to be subject to antidumping duties, the Treasury must, as above noted, find a disparity between the foreign and domestic prices for a general class of goods from a particular country (in statutory terms, it must determine that the foreign goods are being sold for "less than fair value") and the International Trade Commission must conclude that the domestic industry has been injured. The amount of antidumping duties (the difference between the foreign and domestic prices) must then be determined for particular shipments entering the United States.

The International Trade Commission made its "injury" determination for Japanese TVs in early 1971. Thereafter bonds were posted on TV sets subject to the determination to cover the amount of antidumping duties ultimately found to be due. The amount of antidumping duties due on particular shipments was, however, not determined until the Treasury adopted the controversial use of the Japanese commodity tax evaluation. The adoption of this practice thus affects a large quantity of goods imported throughout the period beginning with early 1971. (Some goods entering before that time are also covered, for complicated reasons not worth discussing here.) The application of the commodity tax formula to goods entering for a portion of this period prior to June 30, 1973, resulted in the imposition of duties totaling $46 million. If the method were to be used for all goods with assessments pending, it is estimated that more than $400 million would be due.

Whether it is proper for Treasury to adopt this practice turns on two basic questions. First, does the complexity of the issues, combined with the deception and lack of cooperation of the Japanese manufacturers (and the importers of their goods) alleged by Treasury, justify abandoning the practice of independently determining the value of the goods in the foreign market? Second, if a simplified procedure is warranted, does the Japanese commodity tax valuation sufficiently approximate the valuation criteria of the antidumping laws to be acceptable under those laws?

So far as the first question is concerned, there are unresolved legal issues as to how much the customary methods of evaluation must cost and how much the Japanese manufacturers (and the importers) must have contributed to that cost by their "wrongful" conduct before alternative—presumably less costly but also less accurate—methods can properly be employed. There is also the question as to how much deception and lack of cooperation has actually occurred. Moreover, Treasury has taken the position that if some firms are guilty of deception and lack of cooperation, this justifies the use of the simpler valuation method in dealing with all firms—even those whose conduct has been wholly unobjectionable.

The second question—how closely the commodity tax formulation specified by Japanese law approximates what is required under U.S. law—is equally complex. While, as Treasury contends, the two laws do seem similar in principle, it also appears that certain adjustments appropriate under U.S. law (such as reduction in price to reflect services provided in kind) may not be made under the Japanese law. The Japanese law, moreover, uses various methods of approximation with alternative procedures for actual valuation available to the firm. The influence of the Japanese tax system upon a firm's choice of various assessment methods is difficult to judge a priori. All of this is further complicated by the fact that the Treasury (to some as yet undefined extent) plans to adjust the Japanese tax evaluation in particular cases. How closely the ultimate Treasury determination, using the Japanese commodity tax valuation and making individual adjustments, is likely to approximate the result that would have been reached under the usual valuation methods is a question I cannot answer. One does wonder, however, what savings in administrative cost have really been produced, if courts now have to answer it in order to pass on the propriety of the Treasury practice. Indeed, more generally, it is difficult to believe that substantial savings really have been achieved in view of the costs of adopting the commodity tax valuation, adjusting it to the requirements of U.S. law, deciding which firms are subject to the procedure, and litigating the propriety of its adoption, both in principle and

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in the varying circumstances of particular cases. (I am informed that more than 800 proceedings challenging Treasury valuations are now pending.)

The Political Dimension

It may be that everything I have discussed so far is only one part of a complex operatic scene. At stage left, the lawyers and administrative officials are conducting the debate about appropriate procedure discussed above. But there may be other important actors in the drama (I imagine them at stage right) whose voices, while no doubt influential in determining the outcome, and sounding loud and clear to the audience of decision-makers, come through indistinctly to an outsider like me. I refer, of course, to the public and private players in the larger political game of regulating international trade. It is clear that domestic interests invoke all the available remedies—congressionally imposed quotas and tariffs, countervailing duties supposedly designed to nullify subsidization of foreign goods, the import relief mentioned above, proceedings against "unfair" methods of competition in international trade, actions under the antitrust law, and no doubt many others of which I am unaware. Government officials have considerable discretion in the ways these various laws are applied. In particular, the Treasury, in its enforcement of both the antidumping laws and the law authorizing countervailing duties, has considerable discretion which can be used to make marginal adjustment to grant the degree of protection to domestic interests dictated by the underlying political forces.

How much the adoption of the commodity tax valuation represented such an adjustment toward the equilibrium dictated by the controlling political forces (rather than an effort to "improve" the administration of the law) is an interesting subject of speculation. One is impressed by the fact that the "procedural" change (first suggested by a U.S. manufacturer of television sets) appears to result in larger antidumping duties than were originally anticipated. It is also possible that the failure to complete the determination of the antidumping duties—coupled as it was with preliminary indications of much lower duties than are now likely to be imposed—reflected an earlier, more "permissive" view of the importation of Japanese TV sets than is now held by the Treasury.

There are, moreover, intimations that the willingness of the Japanese to enter into an orderly marketing agreement limiting exports to the United States was premised on some understanding of what Treasury intended with respect to the pending antidumping valuations. Although the Japanese have not explicitly charged "betrayal," there is no question that their government protested strongly when the commodity tax formula was adopted. And there are signs that the Treasury is vacillating: so far the commodity tax formula has only been applied to a small percentage of the cases for which it was supposedly designed. Thus, the ultimate outcome may well be determined by the complex interplay of political influence rather than by a legal decision as to the propriety of Treasury's actions.

Conclusion

It is a pervasive theme in the thinking of people skeptical about the social value of much government intervention in economic affairs that a large portion of the harm derives not from the outcome produced by the intervention but from the resources wasted in implementing it and in trying to influence its result. It would require large social benefits to justify the expenditures (actual and contemplated, public and private) in the controversy over how antidumping duties on Japanese television sets should be determined. To me it is plain that sufficient benefits do not exist to justify these costs, or indeed any costs, because I believe that the law serves no worthwhile ends. It would seem reasonable, however, to ask those holding a contrary view to demonstrate not only that there is in principle something to be said for the law, but also that its objectives can be secured at a cost that makes their attainment worthwhile. Of course, I realize that the questions whether to have an antidumping law and, if so, with what mode of enforcement will be answered in political forums in which the nice calculation of overall social cost and benefit may be influenced by the interests of those making the decisions and those seeking to influence them. Still, some good may come from heightened awareness of the social cost of this method of conferring private benefits. ■

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Readings
of particular interest

On Federal Corporate Chartering

Government and the Corporation by Ralph K. Winter (Washington, D.C.: American Enterprise Institute, 1978), 73 pp.

"Just as the English Crown seized the chartering privilege to increase its own power," writes Ralph Winter of Yale Law School, "federal chartering would centralize power in America." In this study, he criticizes William Cary's "conventional academic analysis," which holds that federal regulation is necessary because state chartering of corporations benefits management at the expense of shareholders. Winter contends that the competing legal systems in the several states tend to improve the shareholder's relation to the corporation and that state corporation codes are actually consistent with what economic theory suggests are the best legal arrangements.

The view held by Cary, former chairman of the Securities and Exchange Commission, is shared by consumer advocates like Ralph Nader. It rests upon two assumptions that Winter challenges here. The first is that the unrestrictive corporation code used by Delaware (where roughly 40 percent of our largest corporations are chartered) leaves shareholders unprotected from unscrupulous management and is in any case only half-heartedly enforced. The second assumption is that the separation of ownership and control gives management too much discretion.

To answer the charge that Delaware's laws fail to protect the shareholder adequately, Winter argues that if Delaware permitted corporate management to profit at the expense of stockholders, unlike other states, earnings of Delaware-chartered corporations would fall in relation to those of other corporations, their shares would trade for less, and they would have trouble attracting debt and equity capital. As their share prices declined, these corporations would be subject to more frequent and more successful takeover moves. In fact, corporations gravitate toward those state legal systems that attract capital, and states, on their part, tend to provide legal systems that take into account the proper shareholder-corporation relationship. The fact that other states have changed their laws in response to Delaware's, Winter observes, "strongly suggests that investors . . . believe that they are doing better under Delaware law than under the laws of the other states."

The problem of too much management discretion—or, as it is described here, the concern for shareholder "control"—takes on a different aspect when one considers the constraints within which corporate managements operate: the need to compete in the market for products and services and to be concerned about the price of shares. If a corporation's product competes ineffectively in the market or if its share prices fall too low, management will be replaced, either by board of directors' action or as a result of a successful takeover bid.

In addition to those asserted justifications for federal chartering which focus upon the alleged need to protect shareholders, appeal is also made to a more fundamental social need. Corporations, it is said, dominate our national life and therefore must be federally controlled to assure that they pursue socially defensible ends. Winter is critical of this argument and discusses several proposed devices for achieving social control. He opposes putting representatives of certain outside groups on corporate boards, or subjecting board decisions to special procedures (like a vote by "affected" outside groups) because, in his view, management would then more likely aim at getting along with its "constituents" than at maximizing shareholder profits. He also opposes increased disclosure of information about corporations on the grounds that the cost of vastly increased paperwork would lead to higher prices,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

while much of the information would be ignored—except by business competitors. Winter calls for a selective approach to disclosure based on the need to enforce or evaluate specific government policies.

There is considerable evidence that corporate power in America is vastly overrated by critics. Winter supports this conclusion by comparing corporate power with the power of the media and with the influence of dominant university opinion on American attitudes—especially toward business. By contrast with the opinionmakers, businessmen are hesitant, defensive, and not notably successful in lobbying against legislation, especially when challenged by labor, consumer groups, or environmentalists.

One of the most fundamental questions is whether governmental power is really preferable to corporate power. "We have had enough experience with government decisions," writes Winter, "to compare them with those of a firm, and the comparison is hardly favorable." He compares corporate plant closings in response to changes in consumer taste with government policies that do equal or greater harm to local communities but that are adopted solely because of political clout "or the whim of one person." Increased federal intervention, he concludes, would surely mean damage to stockholders, continued government growth at the expense of the private sector, and serious impairment of the economy.

Federal Regulation of State and Local Governments

"A Crisis in the Fiscal Commons: The Impact of Federal Expenditures on State and Local Governments" by Paul L. Posner and Stephen M. Sorett, in *Public Contract Law Journal*, vol. 10, no. 2 (Winter 1978), pp. 341-377.

The "crisis" to which the title refers is produced, in the authors' words, "when noncentralized and uncoordinated Federal programs with requirements for participation by other levels of government collectively place unintended and undesirable strains on the non-Federal governments' ability to function as economically viable units." Paul Posner and Stephen Sorett, respectively political scientist and lawyer with the General Accounting Office, describe the state and local budgetary process as a "fiscal commons," because it is in this process that various interests meet to allocate public resources. The multiplication of uncoordinated and even contradictory conditions attached to federal programs produces serious hardships—both administrative and financial—for state and local governments. And in the last analysis, profound issues of state sovereignty, financial solvency, and administrative flexibility are at stake.

"Many burdensome and costly federal regulations are imposed as a condition for participation in a wide range of Federal assistance programs," Posner and Sorett contend. Even though the states and localities do not have to comply with the regulations, the threat of losing federal assistance usually brings them around. For example, a local area that does not comply with Housing and Urban Development flood-control standards cannot qualify for its federal subsidy for construction or property acquisition. For another example, in the case of the education for handicapped children program, it is estimated that federal grants will cover no more than 10 percent of program costs. In addition to specific grant requirements, state and local governments must accomplish a "broad range of national social objectives," including providing the handicapped and the disadvantaged with equal access to services, protecting environmental quality, paying prevailing wages for construction workers under contract, and carrying out merit-based civil service systems. The costs of compliance are so great that some state and local entities have chosen not to participate.

The categorical grant system ($64.4 billion of the estimated 1979 total of $84 billion) has a number of undesirable consequences for state and local governments, argue the authors. Systematic planning at the state or local level is frustrated because the chief executive's control over his subordinates and "functional experts" is short-circuited by their direct accountability to the source of federal funds and to federal-level specialists. Real state and local needs must often be slighted because the restrictive nature of the categorical grant system distorts local priorities.

Another distorting effect of federal grant programs is the requirement for matching

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

funds as a condition for receiving federal aid. This has led, in some cases, to a long-range distortion like the one found in New York City. This was a distinct shift in city spending from such basic services as police, fire, and sanitation, to those social services and health areas that receive generous federal funding.

Posner and Sorett conclude that "federal grants tend to alter internal political systems by awakening latent constituencies, arousing public expectations, and essentially stimulating new demands of local services." They point out that if federalism is to be preserved, then those at the federal level must begin to take an interest in reinforcing the fiscal vitality of state and local governments. They find some evidence that this is occurring in programs like Anti-Recession Assistance, CETA, and the President's requirement that federal agencies file "urban impact analyses" to describe the potential undesirable impact of new federal initiatives. Another hopeful sign, they believe, is the Federal Grant and Cooperative Agreement Act of 1977, which may lead to institutionalized safeguards for the sovereignty and autonomy of state and local governments. But so far, the most promising development has been the Supreme Court's decision in *National League of Cities* v. *Usery* (1976), in which the Court held that a congressional attempt to impose federal wage and hours standards on state and municipal workers "unduly interfered with state sovereignty." In this instance, the Court used the Tenth Amendment as a limitation on Congress's power under the commerce clause. In Posner and Sorett's opinion, *National League of Cities* casts doubt on the federal government's authority to require states to implement federal spending programs. The Court has provided standards for balancing "appropriate national policy objectives against the objectives of preserving viable and sovereign states."

Regulation and the Polls

"The Public View of Regulation" by Seymour Martin Lipset and William Schneider, in *Public Opinion*, January/February 1979, pp. 6-13.

"The public today is far more knowledgeable about the costs of excessive government power and increasingly alert to the possibility of anti-social behavior by government," conclude Seymour Martin Lipset of the Hoover Institution and William Schneider of Harvard University. Reviewing opinion surveys of public attitudes toward government regulation of business, they find the responses surprisingly consistent over the past forty years. Whenever the public has been questioned, the majority has opposed greater regulation of business, while nevertheless supporting more regulation of labor unions. This does not mean, however, that there is measurable support for a *decrease* in regulation.

The authors report that "politicians and government officials are much more likely than the public to feel that business is overregulated." In 1978, 48 percent of the members of Congress and 53 percent of the state legislators interviewed by Yankelovich thought that business was overregulated. In similar polls that year, only 26 percent of the general public thought there was too much regulation, and 33 percent favored more regulation.

One area of regulation is receiving increased public support, and that is wage and price controls. In October 1978 the Harris poll reported that the public favored a nationwide system of wage and price controls (as distinguished from voluntary efforts) by 58 percent to 35 percent. On the other hand, when asked by various pollsters about which institution was "most responsible for inflation," the public placed much more blame on government than on business or labor. The *Los Angeles Times* poll of January 1979 found that 43 percent blamed government for inflation, 9 percent blamed business, and 24 percent blamed labor unions.

Support for continued business regulation rests on the belief that it protects the public from the "bad behavior" of businessmen (including high prices, pollution, inferior products, exploitation of workers, and corruption), as well as on a general suspicion of bigness and concentrated power. Public opinion makes a clear distinction between big business and small business, showing sympathy for the latter, and also makes a distinction between regulation that corrects business abuses and regulation that tells firms "how to run their business" or forces them "to raise production costs or prices unreasonably." For example, in a 1977 *U.S. News* poll, respondents expressed vigorous

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

opposition (53 percent to 24 percent) to the idea of regulating what firms can produce, how much they can charge, and how much they can pay. Respondents agreed that regulation was necessary to maintain safe working conditions (67 percent to 22 percent) and to guarantee safe products (57 percent to 31 percent); but they also agreed that "the more government regulation there is, the less efficiently companies can operate" (65 percent to 22 percent).

Lipset and Schneider find that basic attitudes toward government regulation of business fall into four categories. (1) A small minority favors nationalization of unpopular industries (the most unpopular is oil, with 20 percent disapproving). (2) A third to a quarter of the public favors government intervention in the form of forced divestiture or increased regulation ("moderate" responses, in that they are not hostile to free enterprise). (3) A plurality (in the case of all industries but oil) "favors the present system—which includes, for most industries, a substantial amount of government regulation." (4) Some 10 to 20 percent favor less government control and regulation than at present.

Ranking Energy Sources by Risk

"Risk with Energy from Conventional and Nonconventional Sources" by Herbert Inhaber, in *Science*, vol. 203 (February 23, 1979), pp. 718-723.

This article attempts a preliminary evaluation of the risks to human health associated with each type of energy production. Herbert Inhaber, a scientific adviser to the Atomic Energy Control Board in Ottawa, emphasizes in particular the so-called "nonconventional" or "renewable" sources of energy. His study shows that "when the entire fuel or energy cycle, rather than only one part of it, is evaluated, the risks from nonconventional energy systems can be substantially higher than those of some conventional systems."

The study considers eleven sources of energy, five of them conventional (coal, oil, natural gas, nuclear, and hydroelectricity), and six unconventional (solar thermal electric, solar photovoltaic, solar space heating, methanol, wind, and ocean thermal). In order to avoid suggestion of bias, he gave nonconventional energy systems the benefit of the doubt in calculating risk, whenever possible. In addition, he says, he assigned "lifetimes" to nonconventional systems that are considerably longer than have so far been proven experimentally, and he assumed higher capacity than may be justified.

Inhaber's article points out that the greater part of the risk to human health from energy producing systems is from either industrial and occupational sources or pollution effects, and not from catastrophic accident. In his calculations he adds catastrophic risk and noncatastrophic to get a total figure. Three main types of data were used: (1) "health damage due to pollutants," (2) "industrial accident and disease statistics," and (3) "materials and labor used for energy systems."

There are two controversial areas of energy risk data—the health effects of burning fossil fuel and the safety and public risk of light-water nuclear reactors. The author refers to the recent controversy over the Rasmussen report on the safety of nuclear power on the latter. In an attempt to correct for any pronuclear bias, he uses the highest values of health risk, taken from a number of sources. Present-day technologies are relied on here and no future breakthroughs are assumed.

Inhaber notes frequent claims that decentralized energy systems, like solar space heating, have many positive advantages, including low public risk as well as "less dependence on political and economic authority." His findings show, however, that low public risk is not one of the advantages of such systems and that, in fact, "highly centralized systems such as natural gas and nuclear power production have a far lower risk." Nonconventional systems such as solar and wind require large backup and storage systems because of the undependability of the power source, and the risks associated with these backup systems must be taken into account.

He divides his findings into (1) risk to those who work in the industry, (2) risk to the public, and (3) the total of these two. The highest occupational risk is from methanol, then solar photo-voltaic, windpower, and solar space heating; natural gas has the lowest occupational risk, followed by nuclear-produced energy. These relationships change when risk to the public is calculated: here coal and oil are

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

highest, followed by wind power. In the final computation, total risk, the energy sources with the highest risk are coal, then oil, then photovoltaic, next wind and solar thermal (about even); while those with the least risk are natural gas (the lowest of all considered), nuclear, and third, ocean thermal.

The author attributes his surprising conclusion on the high risk of nonconventional energy systems to the large amount of materials these systems require and to the risks associated with backup energy and energy storage.

NAS Reports on Saccharin

Food Safety Policy: Scientific and Social Considerations by the Committee for a Study on Saccharin and Food Safety Policy (Washington, D.C.: National Academy of Sciences, March 1, 1979) (no consecutive pagination).

This report is the product of the Saccharin Study and Labeling Act of 1977, which requested the National Academy of Sciences to study both the effects of saccharin on human health and the issues of food safety policy in general. The first part of the NAS study, whose recommendations are contained in chapter 10 of this report, was published in 1978 under the title *Saccharin: Technical Assessment of Risks and Benefits.*

Since Congress asked for a full range of options on the saccharin issue, the report outlines policies ranging from a total ban on saccharin for human consumption to allowing its unrestrained use. The committee notes, however, that most of its members opposed both of these extremes. The true range of committee opinion, therefore, is from banning saccharin except in drugs or dentifrices to sponsoring a special warning program aimed at those populations with the greatest risk potential from saccharin use. The majority of the committee was persuaded by the scientific evidence that saccharin is a low-potency animal carcinogen, "cancers are irreversible and usually serious," and human exposure is extensive because of wide use.

The committee's general recommendations proposed that three risk categories be established—high, moderate, and low—and that saccharin be placed in the high or moderate category. With saccharin so classified, the FDA could take actions alerting users to its dangers and encouraging research to develop alternative nonnutritive sweeteners and to learn more about its actual effects, both negative and positive; but saccharin would still be available to those, like diabetics, who consider its use worth the risk. All of this might lead, in the committee's opinion, to the gradual phasing out of saccharin, perhaps over three to five years.

In the area of food safety policy in general, the committee examined a number of questions. Should food be regulated differently from other safety matters? How should we value risk and benefit? Should cancer risk dictate special handling? How much discretion should be given to a regulatory agency? The report advocates (1) a comprehensive system that applies to all foods and their constituents, (2) a system that discriminates among risk levels and assigns priorities on that basis, (3) an FDA viewpoint that encompasses the total food supply rather than examining substances in isolation, (4) use of a variety of approaches including education, and (5) more regulatory discretion. In addition to taking risk into account, the regulatory process should consider how to develop safer substitutes, what major burdens might fall on the public if substances were banned, and whether certain groups would be more affected than others.

The FDA should have the statutory authority and resources to "assess the risk of all constituents in the food supply" and, where possible, it should assess benefits. Nevertheless, the committee states "it should continue primarily to be risk that triggers government intervention in the food supply." The committee finds that the FDA, as now organized and staffed, is not in a position to make "rational and balanced judgments as it selects one item for regulation and ignores another one."

Minority comments questioned the feasibility, given present knowledge, of establishing the three risk categories and disagreed with the decision to postpone action on saccharin. Another minority comment argued that the real risk of cancer from saccharin use is extremely small and urged that the report take account of competing health benefits, in particular the problem of overweight. Opinion also differed on the merits of the regulatory policy required by the Delaney clause (which directs the FDA

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

to ban food additives that cause cancer in animals or humans, however remote the risk).

The report clearly reflects, according to HEW Secretary Califano's accompanying letter, disagreement about how risk is to be accepted and managed, once it has been estimated scientifically. The secretary concludes that the "decision can be made only by the political process."

Regulation in the Supreme Court

This Reading summarizes four articles pertinent to the history and process of regulation, with particular reference to the role of the courts. They are contained in the 1978 Supreme Court Review, *Philip B. Kurland & Gerhard Casper, eds. (Chicago: University of Chicago Press, 1978).*

● "The Facts of *Munn* v. *Illinois*" by Edmund Kitch and Clara Ann Bowler, pp. 313-334.

Edmund Kitch and Clara Ann Bowler of the Law School of the University of Chicago shed new light upon the background and import of one of the most renowned economic regulation cases to reach the Supreme Court. The 1877 decision in *Munn* v. *Illinois*, popularly known as one of the "Granger cases," sustained an Illinois statute that set a ceiling price for the service of transferring and storing grain in Chicago. The decision has been regarded as an early and important example of the validation of price control legislation which had the effect of impairing the value of business property. The authors argue that, contrary to what has generally been assumed, (1) the act was passed at the behest of the Chicago business community, not the farmer-shippers, (2) it did not affect the value of the regulated grain elevators, and (3) the case did not present to the court the issue of reasonableness of the ceiling rate. The article is a short, concentrated look at business-government relations in the period after the Civil War.

● "*Zenith Radio Corp.* v. *U.S.*: Countervailing Duties and the Regulation of International Trade" by Warren F. Schwartz, pp. 297-312.

Warren F. Schwartz of the University of Virginia Law School discusses the Supreme Court's decision last term in *Zenith Radio Corp.* v. *United States*, which held (1) that the Trade Reform Act of 1974 does not require assessment of a countervailing duty upon imported goods to cover foreign domestic taxes that are remitted upon export and (2) that the question whether such remission constitutes a countervailable "bounty or grant" within the meaning of the statute is left to the sound discretion of the Treasury Department. Schwartz is content with the outcome of the case, in part because he believes, for reasons he describes, that "no convincing case can be made for having a countervailing duty law." He disapproves, however, the Court's reasoning in arriving at its conclusion, finding a distortion of the congressional intent and a mis-description of the economic consequences of tax remission. He suggests other justifications for the decision which would recognize the political role conferred upon Treasury and the courts in the compromise between protectionist and free-trade forces embodied in the Trade Reform Act.

● "*FCC* v. *National Citizens' Committee for Broadcasting* and the Judicious Uses of Administrative Discretion" by Daniel D. Polsby, pp. 1-38.

Daniel D. Polsby of Northwestern University Law School comments on the decision of the Supreme Court last term in *FCC* v. *National Citizens' Committee for Broadcasting*. The FCC had adopted a rule declaring that, in the interest of diversity of speech, it would thenceforward refuse to grant television and radio station licenses to owners of daily newspapers in the same communities, but that this refusal would not apply to newspaper owners already holding licenses, who could be relicensed indefinitely. On review, the Court of Appeals for the District of Columbia Circuit had sustained the rule but not the grandfather clause, which it found to be unsupported by sound reasons of policy. In remanding, it had effectively compelled the FCC to reissue the rule without the exemption for existing media combinations. The Supreme Court reversed this part of the decision. Polsby explains this holding, not in the Court's conclusory terms, but by asking what of substance could usually be added to agency deliberations by judicial intervention. In this case, he rejects the expertise of the court of appeals in articulating and applying constitu-

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

tional policy as hopelessly ambiguous, since first amendment interests are enlisted on every imaginable side of the newspaper-broadcasting cross-ownership issue. The author concludes that in the most consistently helpful model of judicial review of agency decisions the court would act as a watchdog, imposing minimum standards of clarity and comprehensiveness of focus but avoiding responsibility for the substance of the rules which emerge from the process.

● *"Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court" by Antonin Scalia, pp. 345-409.

Antonin Scalia of the University of Chicago Law School uses the Supreme Court's decision last term in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council* as the vehicle for discussion of several fundamental issues affecting administrative procedure and judicial review. He finds that the Court's decision—sharply reversing the Court of Appeals for the District of Columbia Circuit for imposing upon the agency procedural requirements for rulemaking in excess of those mandated by the 1946 Administrative Procedure Act—was in accord with earlier Supreme Court jurisprudence that had been ignored by the D.C. circuit. The latter court, which has a near-monopoly upon significant federal administrative appeals, has, in his view, repeatedly departed from applicable Supreme Court guidance, and in such fashion as to render the results unappealable. He finds that the practice has continued even after the extraordinarily critical *Vermont Yankee* opinion, with serious implications for the judicial and administrative systems. Turning to the merits of the procedural issue, the author finds that the D.C. circuit's approach may be closer to correct than the Supreme Court guidance that it disregards. Because of court-approved or court-created changes since 1946 in agency practice and in the timing and techniques of judicial review, the Administrative Procedure Act cannot, as the Supreme Court suggests, be strictly interpreted and narrowly applied without producing effects that are drastically out of accord with what was originally contemplated. Scalia doubts that the Supreme Court would follow its *Vermont Yankee* opinion to its logical conclusion and discusses several approved techniques for departing from the original meaning of the Administrative Procedure Act. Finally, the article notes the current fragmented state of federal administrative procedure, attributable in large part to the congressional practice of establishing tailor-made procedural provisions—different from the Administrative Procedure Act—for new substantive laws. He suggests as the only feasible cure a revised Administrative Procedure Act that sets forth a number of standardized procedural formats for the Congress to choose from, selected not merely to ensure fairness and efficiency in varying statutory contexts, but also to perform the other function of procedures, often forgotten by all but the Congress: the calibration of agency activism and power.

Costs of Air Pollution

Air Pollution and Human Health by Lester B. Lave and Eugene P. Seskin, Resources for the Future (Baltimore: Johns Hopkins University Press, 1977), 368 pp.

This book is the result of a ten-year study of the scientific research on the health effects of air pollution. "The only unequivocal measurement of health status is death," write economists Lester Lave of Carnegie-Mellon University and Eugene Seskin of Resources for the Future. Because of the lack of reliable statistics on illness (morbidity), the study concentrated exclusively on mortality data, and then translated mortality into dollars in order to compare health changes with increased investments in air-pollution abatement.

Lave and Seskin found a consistent relationship between air-quality levels and mortality rates in 117 Standard Metropolitan Statistical Areas measured in 1960, 1961, and 1969. The investigation focused mainly on sulfur oxides and suspended particulates, largely because the data on these are available.

Numerous problems had to be overcome in the analysis. Many factors affect mortality rates —socioeconomic characteristics, environmental factors, personal habits, and physical characteristics. For some of these, particularly personal habits, few reliable data are available. The true cause of death is often not known, and

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

data on air quality are not carefully enough measured. Nevertheless, using a number of statistical tests, Lave and Seskin found a significant increase in mortality that affects the elderly—primarily from stationary sources of air pollution such as power plants and factories. On the other hand, they found "little evidence indicating an important association between automobile emissions and ill health on a nationwide basis."

Armed with these findings, they set out to measure the costs and benefits of reducing air pollution from stationary and mobile sources. In the case of stationary source pollution, the Environmental Protection Agency estimates costs of about $9.5 billion a year (in 1973 dollars) to reduce particulate emissions by 58 percent and sulfur oxides by 88 percent. Lave and Seskin conclude that present mandated controls on sulfur oxide and particulate emissions have benefits that exceed the costs. But in the last analysis, the argument for spending the money necessary to meet EPA standards for stationary emissions rests on the benefits to human health. The authors calculate that pollution reductions corresponding to established control levels would bring a 7 percent decrease in total mortality by 1979, amounting to an annual benefit of $16.1 billion (in 1973 dollars).

The cost of reducing mobile emissions to meet the strictest requirements of the Clean Air Act could reach $11 billion annually, according to a National Academy of Sciences study. The authors' calculations indicate that the costs of meeting the current standards for mobile sources of air pollution are more than the benefits. For this reason they suggest that the most severe of the current standards ought to be suspended or delayed. Because mobile emissions controls are considerably less justified by cost/benefit evaluation, it would be better to support a "two car" strategy—that is, stricter standards for cars in urban areas with air pollution problems.

Lave and Seskin remind us that they have been conservative in their estimates of the health benefits, and that "there is a systematic tendency in benefit-cost analyses to underestimate the benefits and overestimate the costs." They urge further study of the air pollution/human health relationship and improved methods of measuring benefits and costs.

Regulators and Religion

(Continued from page 34)

eral tax reduction is most unlikely, but personal tax deductions and credits provide a realistic alternative. They bring, to be sure, some risk of increased government controls, but a much lesser risk than direct federal assistance and one clearly preferable to the apparent alternatives of state cooption or slow extinction.

One current proposal (H.R. 1785)—cosponsored by Representatives Joseph Fisher (Democrat, Virginia) and Barber Conable (Republican, New York)—would allow all taxpayers to take a deduction for their charitable gifts, whether or not they itemized their other deductions. Martin Feldstein of Harvard University estimates this measure would raise private charitable giving by $4.1 billion annually, at a cost to the federal treasury in lost tax revenues of $3.6 billion. The tuition tax credit plan advanced by Senators Daniel P. Moynihan (Democrat, New York) and Robert Packwood (Republican, Oregon) would ease the burden on parents who choose to send their children to church-sponsored and other private schools, which would of course benefit those schools.

. . . rules and regulations affecting the church community are symbol and symptom of the welfare state's uncharted growth and unstable authority. Caesar . . . takes his belated revenge.

In the last analysis, the rules and regulations affecting the church community are symbol and symptom of the welfare state's uncharted growth and unstable authority. Caesar —toppled according to Edward Gibbon by the spread of religion—takes his belated revenge. And churches often serve as his unwitting accomplices. The long-term challenge for American churches is to combine their pursuit of social justice with a recognition of their vital interest in preservation of the classic liberal philosophy that views with suspicion, and wherever possible avoids, government intervention. The related (and more difficult) challenge for public policy-makers is to reconcile the welfare state with our troubled but still vital voluntary and religious institutions. ■

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

THE AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, established in 1943, is a publicly supported, nonpartisan, research and educational organization. Its purpose is to assist policy makers, scholars, businessmen, the press, and the public by providing objective analysis of national and international issues. Views expressed in the institute's publications are those of the authors and do not necessarily reflect the views of the staff, advisory panels, officers, or trustees of AEI.

Council of Academic Advisers

Paul W. McCracken, *Chairman, Edmund Ezra Day University Professor of Business Administration, University of Michigan*

Robert H. Bork, *Alexander M. Bickel Professor of Public Law, Yale Law School*

Kenneth W. Dam, *Harold J. and Marion F. Green Professor of Law, University of Chicago Law School*

Donald C. Hellmann, *Professor of Political Science and International Studies, University of Washington*

D. Gale Johnson, *Eliakim Hastings Moore Distinguished Service Professor of Economics and Provost, University of Chicago*

Robert A. Nisbet, *Resident Scholar, American Enterprise Institute*

Herbert Stein, *A. Willis Robertson Professor of Economics, University of Virginia*

Marina v. N. Whitman, *Distinguished Public Service Professor of Economics, University of Pittsburgh*

James Q. Wilson, *Henry Lee Shattuck Professor of Government, Harvard University*

Executive Committee

Herman J. Schmidt, *Chairman of the Board*
William J. Baroody, Jr., *President*
Charles T. Fisher III, *Treasurer*
Richard J. Farrell
Richard B. Madden
Richard D. Wood

Gary L. Jones, *Vice President, Administration*

Edward Styles, *Director of Publications*

Program Directors

Russell Chapin, *Legislative Analyses*

Robert B. Helms, *Health Policy Studies*

Thomas F. Johnson, *Economic Policy Studies*

Sidney L. Jones, *Seminar Programs*

Marvin H. Kosters/James C. Miller III, *Government Regulation Studies*

Jack Meyer, *Special Projects (acting)*

W. S. Moore, *Legal Policy Studies*

Rudolph G. Penner, *Tax Policy Studies*

Howard R. Penniman/Austin Ranney, *Political and Social Processes*

Robert J. Pranger, *Foreign and Defense Policy Studies*

Periodicals

AEI ECONOMIST, Herbert Stein, *Editor*

AEI FOREIGN POLICY AND DEFENSE REVIEW, Robert J. Pranger and Donald C. Hellmann, *Co-Editors*

PUBLIC OPINION, Seymour Martin Lipset and Ben J. Wattenberg, *Co-Editors;* David R. Gergen, *Managing Editor*

REGULATION, Antonin Scalia and Murray L. Weidenbaum, *Co-Editors;* Anne Brunsdale, *Managing Editor*

William J. Baroody, Sr., *Counsellor and Chairman, Development Committee*

ADVISORY COUNCIL, CENTER FOR THE STUDY OF GOVERNMENT REGULATION

Irving Kristol (chairman), Robert H. Bork, Bill Brock, Ronald H. Coase, Kenneth Dam, John N. Erlenborn, Bryce N. Harlow, Robert H. Hatfield, Ernest F. Hollings, Max M. Kampelman, Lewis Lehrman, Richard Posner, Richardson Preyer, R. Randolph Richardson, William Ruckelshaus, George P. Shultz, Paul Weaver, Murray Weidenbaum, Aaron Wildavsky, and James Q. Wilson. Marvin H. Kosters (director) and James C. Miller III (co-director).

American Enterprise Institute for Public Policy Research
1150 Seventeenth Street, N.W. • Washington, D.C. 20036 • 202/862-5800

The Ratings Are In:

"A real winner."
John Roche
Washington Star

"For those of us who like to know what people across the country are thinking, there's a new publication with a lot of answers. It's fascinating."
Houston Chronicle

". . . makes even statistics fascinating! . . . full of interesting studies, written in plain English."
Arizona Republic

Public Opinion

After its first year of publication, *Public Opinion* magazine gets high marks across the board. Unique in concept, *Public Opinion* combines feature articles with a special 20 page roundup of current opinion data.

Subscribe today!

Published by the American Enterprise Institute
Subscription rates: $12.00 for one year,
$22.00 for two years.
Available from:
American Enterprise Institute,
PUBLIC OPINION Magazine,
1150 17th Street, N.W.,
Washington, D.C. 20036.
Or you may call: 202/862-5911.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

People Are Talking

"*Regulation* deals with the issues at the leading edge of discourse on political economy today. It is invaluable and, more surprising, it is entirely readable."
Daniel Patrick Moynihan
U.S. Senator, New York

"An irreverent journal on government regulations, [it] is yeasty with ideas on heavy and prosaic subjects alike. Who else would take note of [regulation of] taxis and jitneys?"
Nick Thimmesch
Los Angeles Times Syndicate

"Bound to be must reading for persons interested in regulatory matters. . . ."
The Washington Post

"[With] journals like *Regulation* . . . paying sustained attention to [regulatory] phenomena, maybe there'll at least be a better chance of an occasional correction in course."
Wall Street Journal

"It's absolutely splendid! I find it particularly useful for keeping up with the rapidly changing regulatory world."
Kenneth W. Dam
University of Chicago Law School

"In *Regulation,* the nation has a journal with penetrating articles on the intellectual dimensions of what has become perhaps the major concern about public policy today."
Paul McCracken
University of Michigan

"*Regulation* is excellent . . . and fills an important need. The articles are short and trenchant. . . ."
Robert T. Miki, Director
Office of Regulatory Economics and Policy, Department of Commerce

"I am especially pleased because it is written in clear English without jargon."
Irvine H. Page, Editor
Modern Medicine

"The magazine's discussion of much current government activity is well edited, authoritative, and timely—and comes to us via editorials, articles, and good book reviews."
Library Journal

". . . now required reading among regulatory specialists."
Timothy B. Clark
National Journal

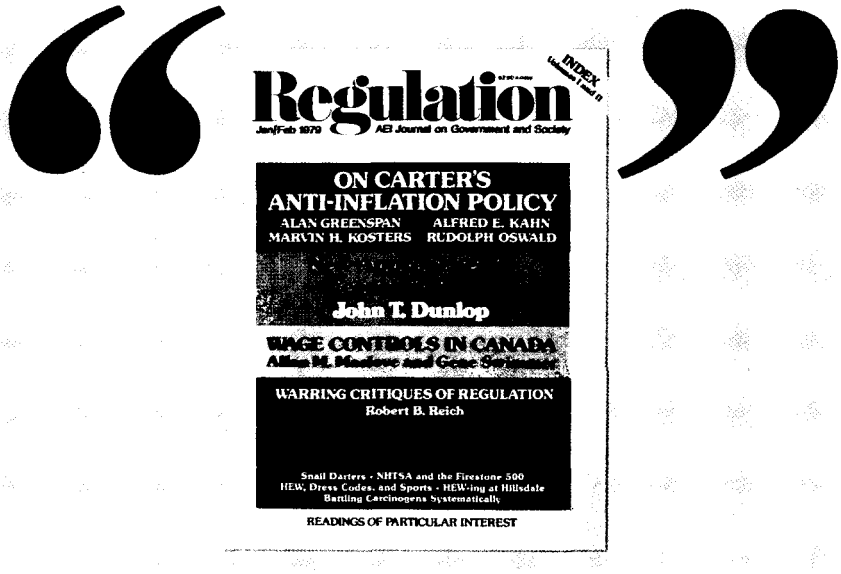
"I applaud the work of *Regulation* magazine. Only through efforts such as this can we raise public awareness of the abuses of regulatory authority and hope to stop the strangulation of government overregulation."
S. I. Hayakawa
U.S. Senator, California

"The regulation rebellion is catching on, as witness the success of . . . *Regulation,* which is now required reading at most major companies, on much of the Hill, and even in parts of the Executive branch."
National Review

". . . achieving a considerable success. The timing is right, for even the liberals are questioning whether much federal regulation is worth the pain and price."
St. Louis Globe-Democrat

"Perhaps best of all, *Regulation* is close to the middle path I deem essential for an influential journal."
Dwight Waldo
Syracuse University

Subscribe now by filling out the card inside this issue.



LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED